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ABSTRACT

This volume is a collection of the nine papers presented at the annual convention of the Association of Educational Negotiators. These papers deal with different aspects of influence (from school management's point of view) in the collective bargaining process. Specific topics include how a chief negotiator can influence his school board to set realistic goals for negotiations, effective lobbying to influence state legislation on collective bargaining, interdistrict cooperation to combat union tactics, management techniques for influencing a union to accept a settlement, the public's right to information and involvement in collective bargaining, influencing state labor relations boards, the effect of sunshine laws on collective bargaining, mediation, and factfinding and arbitration. (DS)

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School Negotiations In the Mid-Seventies

Proceedings of the Seventh Annual Convention of the Association of Educational Negotiators

March 31-April 2, 1976

In New Orleans

EA 008 380

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Editor's Comment About This Book

The Association of Educational Negotiators, those who negotiate for school boards and colleges, has been in existence for over seven years. The Association was started by a group of leading school board negotiators who were concerned that there was no professional organization of school management negotiators to affiliate with. As a result the AEN was organized and during its first year several hundred school negotiators became members.

During the intervening years, the Association has been a leading force on behalf of school management. Each year the highlight of the Association is its annual convention, held in different parts of the nation. At the annual convention many activities are provided which are designed to be of practical help to school board negotiators. Naturally, speeches are inevitable, as they should be. These excellent papers are published by the AEN, normally in its monthly journal, the *Bulletin*. However, this year the papers which were presented in New Orleans in April of 1976 are presented in this book form (those not available for inclusion will be printed in future *Bulletin* issues).

This book contains articles which speak to many of the most important issues which school board negotiators face. It is a must reading for all of those who face employee unionism in public education.

Richard G. Neal
Editor

The Association Of Educational Negotiators

Today, school administrators coast-to-coast are being faced with teachers who have organized themselves into powerful bargaining agencies. School districts now, more than ever before, need to have a forceful, unified and effective voice in presenting the management position in all negotiable matters.

A professional association for educational negotiators, the ASSOCIATION OF EDUCATIONAL NEGOTIATORS (AEN) is composed of highly skilled professionals; those who serve as chief negotiators representing boards of education and their team members are active members. Superintendents, administrative team members, board presidents, school attorneys and other advisors are eligible for associate memberships.

Members of the Association exchange information through their own publication, the *AEN Bulletin*, and the annual convention. The publications and all meetings feature technical know-how and sophistication to be found nowhere else.

Elected Officers and Directors of AEN are all practicing negotiators from throughout the country who represent school districts of all sizes. They are supported by a management consulting corporation which directs Association business affairs.

Upon joining AEN the negotiator is assured of maximum benefit and effectiveness. AEN is *the* nonprofit *professional* organization for professional negotiators who negotiate for school boards and colleges. The policy positions of the Association are set by the members and the elected Board of Directors and Officers. It is the purpose of AEN to unite those who negotiate for school boards and colleges into a single strong body; AEN represents an effort to join hands (as portrayed in the Association's logo), as teachers already have done, thereby presenting a united front to help strengthen school management everywhere.

All negotiators, chief executive officers and other members of school management negotiating teams are eligible for active (voting) membership. Other school management personnel and school board members not otherwise eligible for active membership are eligible for associate membership.

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THE BULLETIN: The official monthly publication of AEN. The *Bulletin* contains the most timely information available on the latest developments in the field of negotiations; accepts articles submitted by AEN members; keeps you informed on scheduled seminars, conventions, workshops; answers questions sent in by members concerned with particular negotiations problems.

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How Can a Chief Negotiator Influence His School Board to Set Realistic Guidelines for Negotiations

By Dr. Gordon R. Graves

I'm a psychologist, not an attorney; I'm sure that will be obvious, shortly. Psychology has been defined as "the science of predicting animal and human behavior": I will refrain from any smart remarks connecting that definition to collective bargaining, boards, administration, or unions. As psychology has dabbled in the prediction of behavior, psychologists have invented IQ tests, aptitude tests, achievement tests, projective tests, entry tests, graduate tests, and diagnostic tests. These tests have been norm-referenced, criterion-referenced, unreferenced and frequently unreliable.

In all cases, however, even though a given test might be given to "evaluate" or "measure," that measure became the root of prediction of probable failure or success under given circumstances and standards. The obvious outcome of the prediction of human behavior was a logically subsequent question: what can we do to change the prediction?

One example will suffice: if the low reading score of a given pupil predicts failure in a history class, the obvious corrective measure is to teach the pupil how to read before handing him a history textbook with the admonition to read it well. After several decades of working to develop more precise measures of idiographic, or individual, prediction, psychologists became aware of what should have been an obvious fact: making predictions about groups, their

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Dr. Gordon R. Graves is a chief negotiator for the Fresno Unified School District, Fresno, California. This paper was presented at the Annual Convention of the AEN in New Orleans, March 31, 1976.

have been an obvious fact: making predictions about groups, their actions and decisions, was not only important but brought a different set of problems, both to the group prediction and the subsequent desired modification of group decisions or behavior.

Compared to What

Modern day group dynamics theory started with the work of social psychologist Kurt Lewin in the '30's. Lewin, with his "field theory," integrated two mutually exclusive and, hence, incompatible viewpoints of group functioning. One psychologist, Durkeheim, had hypothesized a "group mind," while another psychologist, Allport, held that only individuals exist, and groups, having no individual entity, were a mere abstraction and did not warrant studying. Lewin held that both the "individual" orientation and the "group mind" were real and important and succeeded in providing for the recognition of the contribution of each to group dynamics.

Implicit to any psychological testing is the function of comparing: a test is given to compare; compare to a norm, to a minimal standard, or to an expectancy. A trained psychologist constantly compares; a clinical psychologist may compare a patient to a standard of "normal" that he holds in his head, while a comparative psychologist may rigorously quantify and compare rat tail twitches under varying conditions.

This is reminiscent of the psychologist who chanced to meet a friend during a walk. The friend said "Hi Joe, how's your wife?" Joe pondered for a full minute and finally responded "Compared to what?" The obvious comparison that we are interested in is how a small group that has a "group mind" differs from a small group that is merely a small collection of individuals, totally lacking group entity or cohesiveness. Perhaps the best way to compare a cohesive group with a group lacking in cohesion is to look at the groups' functions and their goals.

School boards, in common with most groups, are formed to achieve goals. The obvious overriding goal of any public school district's board is to establish and update policies designed to assure quality education in that community, in a manner consonant with legal and fiscal parameters and in line with public interest and direction. That same school board now has, as a major function, the goal of achieving an acceptable collective bargaining agreement with various employee units. Since the school board is the group whose goals must be represented by the board negotiator, it is crucial that the negotiator is able to define, or have defined for him, the board goal or goals to be negotiated. At this point, it is imperative that the goals to be negotiated are truly *group* goals of the given school board.

Group goals differ from individual goals in that they typically (a) require collective action for achievement, and (b) are accepted by most or all of the group's membership. Obviously, an individual feels that it will satisfy an individual goal of his own. Goals tend to be accepted by groups as group goals if (a) they are relevant or important to members, (b) if they are clear, and (c) if the group in which they occur is cohesive.

The Board Mind

If, then, a school board is a cohesive group, the school board goals are clear, and the goals are relevant and important to individual members, that board would probably have what Durkheim would term a "group mind." If, however, the board lacks cohesiveness, the goals are less than clear, and the individual members have differing concepts of relevance and importance, then the board would not have a "group mind," and as a group that board might support Allport's contention that only individuals exist and groups are mere abstractions. I feel comfortable making a prediction about this type of board; their negotiators will be noted for short tenure.

I think it is interesting to note in passing that goals of a corporate board of directors are more apt to be common from individual to individual, since profit is the over-riding goal, and profit has a relatively well accepted common definition. On the other hand, a Bircher, a Jehovahs' Witness, the local "libber" leader, a black Muslim leader, and my Presbyterian minister might just have a little

difference of opinion as to what the more important goals of education are.

If perchance a community elected five members of the John Birch society, who all thought alike, to their five man school board, I would predict an instantaneous "group mind"; the goals would be relevant and important to all members. They would be clear to all members, and the group would not lack for cohesiveness. Their negotiator would have a clear and uncompromising position with consistent direction, and I would predict that the negotiator would probably die in action, but at least he'd be shot from the front.

Having five "think-alikes" on a five man school board in our society is highly improbable. In our society the right to dissent is a cherished privilege. In a school district that is strongly pluralistic, and I think that would include any sizeable or urban district, that dissent will frequently become vociferous and emotional. I would not like to represent a five man think-alike board in a strongly pluralistic community, since community support in conflict bargaining would probably be nonexistent, and employee discontent and militancy would receive consequent reinforcement. It seems obvious that it is both necessary and advantageous to have varying segments of the community represented on the school board.

Solidarity is Good to a Point

I am sure it has become obvious that I am examining school board behavior in the light of small group dynamics. It so happens that research in small group dynamics indicates that productivity and cohesiveness are curvilinear. Two variables that are related may be related linearly or curvilinearly. An obvious example of a linear relationship between two variables is the relationship between intelligence and the ability to succeed in school. Obviously, when intelligence is high so too is the ability to succeed in school, and the higher the intelligence, the higher the ability to succeed. There is not a point where as intelligence increases, ability to succeed in school goes down.

In small groups, however, the relationship between productivity and cohesiveness is *curvilinear*, meaning that very low cohesiveness results in very low productivity, while higher cohesiveness results in higher productivity. This is true only to a certain point, however; then, as cohesiveness *increases*, productivity *decreases*. In our considerations, productivity is the policy and position output of the board as a small group. Good *group* product or output is considered superior to a strictly individual output since a good group consensus or synthesis has considered divergent views and arrived at a point where a maximum number of dissenters is maximally accommodated, and hopefully, the majority of the community is at least placated, if not totally satisfied.

Placing school boards as small groups on this curvilinear scale, it is obvious that if a five man board has absolutely no cohesiveness, no "group mind" whatever, just five strictly differing and uncompromising individuals, there can be no consensus. It remains a fact, however, that bargaining will proceed, and the negotiator will ultimately arrive at the table with a position of sorts for the day. I feel comfortable in predicting that this negotiator, too, shall die in combat. I am just not sure he will get shot from the front. Our five "think-alikes" will have no output by our definition, since they will produce the position of an individual, with no accommodation for dissent or divergence. Consequently, the negotiator has the problem previously mentioned.

I am going to make the assumption that there is not a district represented at this convention that has a board of "think-alikes." I am going to make the further assumption that every district or board represented here would benefit from increased board cohesiveness with a consequent increased productivity of bargaining goals and a resultant setting of realistic bargaining guidelines for their negotiator.

My topic is "How Can A Chief Negotiator Influence His School Board To Set Realistic Bargaining Guidelines." The convention theme, of course, is "Influence: Its Many Faces." In looking at the preservation topics, it seemed to me that most of the "faces" of influence that we consider

in solving disputes or structuring bargaining, are well defined by Webster's definition of influence as ". . . to modify or affect in some way; to act on; to bias; to sway; as the sun influences the tide . . " To me most of the convention topics fit this definition, and an implicit assumption is made that this attempt to modify or bias somebody or something is attempted from an established base and toward a specified goal or specific outcome.

I think it is important to point out that in the developed model that I am presenting, "influence" is a definitive process designed to cause the board to develop group goals that will be accepted as such by all members. In this context, "influence" is *not* selling the board a management-developed position; it is *not* maneuvering the board to accept a management-developed position that can then be negotiated in the name of the board. It *is* influencing the board to develop the cohesiveness and productivity that will result in well developed and stable group goals relative to conflict issues, influence that will be accepted by the individual board members as their position.

Can They Function Under Stress

A psychologist named Festinger hypothesized what has become known as the theory of cognitive dissonance. This theory attempts to explain some elements of how cognitive structures come to change. Frequently through life we observe facts that are in apparent contradiction to previously observed facts or beliefs. When this occurs, we are forced to either reject our previously observed facts or beliefs, reject the new facts, or struggle to synthesize the difference or explain it. The very reason for bargaining is that a high degree of dissonance exists between two or more groups on one or more issues. The difference between two groups, in our case a school board and a union, is frequently not a factual issue but rather a philosophical or political one that sometimes defies a "factual" solution and, hence, tends toward emotionalism. This dissonance between two groups is the basis for bargaining.

Each group, the school board and the union membership, has dissonance between its individual members. To the union, cohesion is necessary for strength also. A strike vote is not possible unless a majority of the voting employees agree in principle on the strike issue or issues and are emotionally involved and committed. That generally takes time and accumulated frustration.

The dissonance between board members relates to Lewin's early explanation of group behavior. Lewin stated that behavior was a function of the individual person or personality and his environment. In this case, environment was used to indicate economic, political, philosophical and religious committments, as well as the physical environment. Obviously then, there is an element of dissonance within the board group itself. A philosophical dissonance exists, perhaps even existing in expressions of differences on financial issues, between individual members because of their difference in environmental backgrounds. Or put another way, dissonance exists because of the differences of opinion existing between the segments of the community which they represent. As an example, there will be dissonance many times between individuals in our group because two positions on a given issue, such as a union proposal on some teacher right vs. the management recommendation on that issue, will be 180° out of phase; *totally* dissonant.

If a given group member, one of our board members, is sympathetic to the union position and represents a segment of the community that is also sympathetic to the union position, but the other four members of the board are solidly for the management recommendation, an interesting phenomenon will emerge. As noted previously, in our society dissent is a cherished privilege. However, conformity is much more prevalent even in conflict situations. The social pressure to conform in small groups, if there is any appreciable cohesion at all, is strong. A deviant member, that is one who differs from the majority or from the consensus on a given issue, will receive strong reinforcement for the deviant position *if* that member has taken a public stand for the deviant position, or if another group member agrees with the position. We have now arrived at a point in our discussion where we can consider how to structure group behavior for productive output, hopefully from a group mind, and what steps can be taken to minimize the

solidification of strong minority postures of the board.

B. Aubrey Fisher did some interaction analyses of group interaction during the decision-making process. He found that there were four phases in decision-making: an orientation phase, a conflict phase, an emergence phase, and a reinforcement phase. According to Fisher, each phase has a distinctively different interaction pattern. We will briefly discuss these differences as we consider the decision-making process as it goes through these four phases. First, however, let me outline my responsibilities in negotiations and in communicating with our school board as we approach and engage in bargaining on the way to an agreement. In addition to being the table representative, I am responsible for the gathering together, or synthesizing, of data for our management team as they develop management recommendations for bargaining. I am also responsible for the presentation of employee proposals to the board, with explanations of the probable affect of these proposals, as well as being responsible for the presentation of management recommendations to the board. I mention my responsibilities, since many districts do not staff similarly. From my frame of reference, I will probably talk about the chief negotiator performing some function that may be assigned to someone else in your district; the function would remain the same however.

You will note that I previously stressed that influencing a board was *not* getting the board to adopt a management proposal. That does not mean that management has no function in proposal writing; it does mean that management writes recommendations for the board's consideration in bargaining.

The board as a group adopts its proposals or counterproposals after considering the union proposal, any other proposals from members and the community, and the management recommendation. It may be that the board will adopt the management proposal verbatim as its position. If so, cheers! I believe, however, that it is crucial that the adopted or developed board position be truly the board's; then that position will be strong, and the negotiator will have minimal concerns about the solidarity of his position as the heat builds. In other words, the rug will not suddenly be pulled out from under him as lobbying of the board members by the community or teachers suddenly changes the board stance. If however, the board adopted a management position, and individual board members never did see it as their position, the position is not apt to be strongly held when push comes to shove.

Who's In Charge Here

Now the question: How *does* a negotiator influence his board to develop and accept a bargaining position as theirs, individually and collectively? In this context I would consider the negotiator to be a group leader, in his relation with the board, and responsible for controlling behavioral dynamics so that the group is productive and cohesive.

It is imperative that the dissonance inherent in dissent and bargaining be constantly monitored. I am not sure that Webster would agree, but I am obviously not using 'dissonant' and 'dissent' as synonymous. In this context dissent is considered a different and/or opposing fixed position, while 'dissonance' is the lack of agreement between observed facts, beliefs, or positions which require the acceptance or rejection of opposing positions, or a modification of a held position, or the development of a new position.

First, it is vital that the individual position of each board member is known. This introduces the orientation phase of decision-making. I am sure that all of us know where our individual board members are philosophically and personally liberal vs. conservative, emotional vs. objective, what segment of the community they identify with, and so forth. However, most contract proposals are so involved that I think it is time well spent, after making a preliminary presentation and interpretation of a bargaining unit's proposal to the board, to sit down with each board member privately and discuss the proposal. Do not simply rephrase the presentation which has already been made. Hopefully, it was comprehensive, and a restatement would simply be redundant.

At this point, board feedback is wanted. To obtain feedback it is necessary to listen, not talk. What seems to be of most importance to that board member? What seems of highest emotional interest? On what issue is that member confused, or alternatively, already holding a strong position? What individual goals does that member have, if any, relative to the proposal? This sequence of interviews is of importance to the negotiator to orient him toward the conflicts that will probably occur as the board considers proposals and counterproposals and works toward a board position.

Touch On All Facets

It should go without saying that any point or issue of the proposal that is important to a board member is important to the negotiator, even though it may be of minimal importance to anyone else. This series of interviews will allow the negotiator to catalog and consider any dissonance that exists within the "group mind" that will require resolution or compromise. Simultaneous to this recognition of disparity within the group, the dissonance existing on two other fronts or levels should be receiving study.

First, the dissonance that exists within the teacher ranks on the issues in their own proposal. The "group mind" represented on the other side of the table is sometimes perceived as a representation of strength and solidarity. The union or association has state and national direction, clearly spelled out goals, and a united front well presented by literature, and a party line that at times may seem formidable. The representative across the table, however, does not represent the united profession of our country; he represents the teachers in your district who are sensitive to community pressure and whose neighbors' children attend the local schools, and who have to live in the community during and after strife just as management and the board.

The "group mind" of the teacher negotiating team is frequently not too well related to the "group mind" of the total teacher population in any district. Problem number one of the teacher negotiator is to convince the teachers of the logic of their position, create emotional issues to generate teacher interest and backing in some circumstances, and perhaps to make the board negotiator, the board, and the management team look like bad guys. The goal of these activities, reduced to group dynamics, is to develop a "group mind" in the teacher population that is congruent with the "group mind" of the teacher team at the table.

Reporting Back

However, initially, there is considerable dissonance, and lack of knowledge, relative to the contract issues as far as teachers are concerned. It is important to monitor this dissonance constantly; great dissonance means little power across the table; little or no dissonance means power and trouble across the table. Early dissonance within teacher ranks, recognized long before the drums have achieved a cadence, should be reported to the board so that early positions and proposals can capitalize on this dissonance, remembering that it takes widespread emotion to generate a strike vote. In order to minimize emotional build-up it seems crucial to not only keep in close contact with classroom teachers and spend a lot of time listening but to communicate with them consistently as to what the board position is, and why, on issues that are of the most concern to them.

If I appear in a faculty lounge, the teachers there will generally assault me verbally without invitation. They will naturally be on the issue that is of most importance to them, and generally the position they perceive as the board position is quite distorted. Frequently the issues of importance differ from elementary to secondary schools, and frequently the importance placed on a given issue at the table is not supported by teacher interviews. These dissonances need to be addressed in several ways. (1) Communicate the board's true position constantly and consistently to all teachers (but that is not my topic), (2) report the dissonance between teacher groups to the board, (3) report with careful accuracy any existing dissonance between actual board position and what teachers have been led to believe is the board table position.

I have strayed a little from my topic, since part of the goal of maintaining a surveillance of

teacher dissonance, and communicating with teachers, is the forcing of the teacher representative toward objectivity and away from emotional build-ups. However, it is also imperative that the board perceive the dissonance in teacher ranks and its change, in order to develop positions that are as consonant as possible with real teacher feelings, feelings that at times are not well represented at the table.

The second level of disparate opinions will be that existing between the teacher bargaining unit proposal and the management recommendations for counters. It is important to completely analyze the teacher positions and the complete whys and whatfors of the consequent management recommendations. At this point, the group will probably end the orientation phase during which initial orientation or study of the problem occurred and enter the conflict stage. Orientation, in a sense, is the introduction to the problem, the presentation of data, the delineating of all disparities; the board during this phase generally questions and listens with minimal conflict. Now, however, the facts are in. The dissonance has been spelled out. The board has alternatives from which to choose and doubtless some suggestions of their own.

At the end of phase one, orientation, if all cognitive dissonance has been spelled out, the board might be very uneasy. A feeling of conflict might develop as conflicting ideologies, facts, or goals compete for a place in the sun. It is of extreme importance that all disparate positions, as far as possible, have been spelled out to all board members during the orientation phase; hopefully, before entering the conflict stage. When the day comes that the negotiator is approaching his bottom line, if all dissonance has been continually spelled out, board members will not suddenly reconsider their position because lobbyists have acquainted them with previously unconsidered facts or alternatives.

Conflict Under Control

In group conflict it is important to do some management of the conflict. As noted previously, a deviant member, that is one that disagrees with other members on a given issue, is under heavy pressure to conform but will be reinforced if a public stand has been made or if some other member reinforces the deviant stand. The chance that a board member holding a deviant position will take a public stand on that position is minimized if all dissonance on that given issue has been well spelled out. Consequently, it is important that the analysis of all disparaties be accomplished as soon as possible *before* public posturing by individual board members occurs.

One important point in conflict management in groups is that while conflict is motivating and can develop cohesiveness and increase output, if anxiety is allowed to develop, or emotions build, learning and adaption stops. Positions solidify irrationally. To minimize emotions, the group leader should be objective, avoid arguing, and try to control any management team members that tend to argue with or get defensive about their position to the board.

If emotions are minimized and conflicting viewpoints are well aired, it may be that you will be blessed with some innovative deviance; some member will look at all disparaties of positions, reject the recommendations and come up with a new solution or position. At any rate, from an airing of conflicting ideas that individuals will have after considering existing dissonance, group accepted positions will start to emerge as the emergence phase is entered. It is not likely that all members will be totally in agreement with the group consensus on the various issues. State what seems to be the consensus and, if general agreement prevails, accept it. Do *not* vote; voting for a group position in a small group tends to factionalize the group. The losers will not have a position that is theirs.

After a consensus has emerged, the reinforcement phase begins.[8] At this point the group has group positions. As pressures build during the heat of a buildup it is important that constant feedback is given to the board. Again, if all dissonance has been carefully spelled out, the board members have nothing new to learn. Lobbying, since it will merely rehash old stuff about which a decision has already been made, will become reinforcing rather than threatening.

To summarize, I would like to reduce this discussion to recipe form. Dissonant facts or disparate opinions will motivate individuals and small groups to modify, accept, or reject those facts or opinions, and arrive at a fixed position. In small group decision-making, early presentation of *all* dissonant facts or disparate opinions will motivate a group to seek the most logical, beneficial, or expedient position. If consideration is given in group meetings to all the alternative positions *before* a dissident or fixed position has been arrived at by individual members, a truly group position is apt to emerge. This process is aided by a deliberate effort to delineate all dissonance and disparate opinions on several levels.

The Decision Process

The board as a group will go through four phases in the decision-making process: (1) Orientation, a phase in which *all* dissonance should be delineated clearly; (2) Conflict, a phase in which all disparate opinions and dissonance are discussed by the board and alternative positions considered; (3) Emergence, the phase in which positions emerge and are solidified into group decisions and positions; and (4) Reinforcement, the final phase. In this phase if the disparaties of all developed positions have been well explored, lobbying and pressure will tend to reinforce board positions as long as the group is held together as a unit and discusses these pressures.

Throughout this whole process, the consistent recognition of dissonance occurs during the following defined activities:

1. Present the union proposal with complete analysis of pros and cons to the board.

2. Meet individually with all board members and find out where each board member is and what is important to them.

3. Carefully research and document all disparity between the teacher proposal and the management recommendation. Do not argue, do not become defensive. Present a considered *recommendation* not a 'management position' that you might have to wind up negotiating with your board.

4. Carefully explore and report the disparate interests and opinions that exist between elements within teacher ranks and between these teacher elements and their bargaining team.

While 1 through 3 occur primarily in the orientation phase, and should be accomplished as soon as possible, this activity continues until bargaining is concluded. This activity tends to help the board develop positions and, consequently, helps to develop a "group mind" with subsequent true group decisions. This activity also tends to modify teacher unit behavior and affect their publicity releases.

In conclusion, I will merely make the remark that a solid and logical board positions when bottom line day comes, is the result of careful planning and much work and does not occur by chance while you are off negotiating.

I am innately chicken. One of my great fears is that when the final shoot out occurs at the end of a long bargaining season, I will walk out onto the main street of our village with my Colt .45 and be handed a box of .22 long rifle cartridges by my board to try to run through by .45. I think the activities I have delineated tend to reduce the probability of that type of dissonance.

It should go without saying that other negotiators differ from me, and other boards are different from mine. The framework I have presented is obviously not a packaged panacea for beneficially affecting the functioning of all boards in developing realistic guidelines for bargaining. I hope, however, that some elements or concepts of this model will help.

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EA 008 382

Effective Lobbying in Influencing a Legislature on Collective Bargaining

By Dr. Fred B. Williams

"Education and politics don't mix."

"The terms 'politics and politicians' have negative connotations to educators."

"School leaders should continue to maintain their lofty perch along the high road of political action and let the state education association descend into the valley of legislative action."

The first two statements have never been able to withstand close scrutiny by educators who believe, as Kimbrough and Nunnery have said, "The quality of public education in the U.S. is related to the ability of school leaders to influence the political system within which the schools function." Moreover, Kimbrough and Nunnery went ahead to note that politics is the art or science of governing: the democratic process of making significant decisions.

The latter statement, pertaining to the state education association, is very suspect and questionable today when we find the educational community so divided over the issue that you are considering – collective bargaining. Across the nation local school leaders are

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Dr. Fred D. Williams is the superintendent of Fort Thomas Independent Schools, Fort Thomas, Kentucky. This paper was presented at the Annual Convention of the AEN in New Orleans, April 1, 1976.

banding together in state administrators' associations. Many of these groups were themselves once satellite organizations, whirling around the education association. Now, they are becoming planets in their own rights. In certain instances, the state administrator associations are made-up of local school superintendents and their chief assistants. In other cases, umbrella groups have surfaced with membership rights extended to everyone with administrative-supervisory responsibilities. Regardless of the type association, more and more of the members are beginning to realize that they must become activists in legislative affairs if their voices are to be heard when educational issues such as collective bargaining legislation are being aired in the halls of the state executive and legislative bodies. Every time these local school leaders take action to influence educational policy, they are involved in politics. If we have a desire to influence collective bargaining legislation, it is imperative that we become good politicians. To become such we must understand the political process and realize that it's an ongoing, continuous process. It is not a role to be assumed only at election time or during that portion of the year when the state legislature is meeting.

The Problem is Yours

In the January, 1972, issue of the *Iowa Association of School Administrators Newsletter*, the following question was raised, "Are you involved politically?" In conjunction with his graduate studies, a local Iowa superintendent surveyed the political attitudes and activities of Iowa superintendents. He found that superintendents, both in their own estimation and from the opinions of others, are not politically active enough.

In the January 13, 1975, issue of *Education U.S.A.*, a weekly publication of the National School Public Relations Association, there appeared an article entitled "Educational Policy is Set by Politics, Study Says". In the article, reference was made to a study conducted by Campbell and others at Ohio State University. The premise of the study, *State Policy Making for Public Schools: a Comparative Analysis*, was that educational policy is born from and thrives on politics. The school finance issue was chosen to illustrate this point. Some major conclusions reached in the study that have implications for us, as we direct our attention to the topic at hand, were:

1. In the four states chosen for in-depth studies, the governors were the rallying points for initiating school finance reform legislation.

2. Even though concerted efforts of both legislators and governors are needed for school finance reform, the executive office provided the crucial political clout. State Boards of Education played a minimal role, and the policymaking influence of state education agencies was of secondary importance.

3. As a direct result of the governors' crucial role in school finance reform legislation, they moved to gain more direct control over the state educational apparatus. Those who supported the governor in his political campaign were less likely to be shut out of legislative activity.

4. Teacher groups were ranked as the most influential at the state level, followed by school boards, administrator groups, and teacher federations (where they exist).

5. Although the fragmentation of education groups has created conflict, everyone concerned (educators, legislators, governors and the general public) has come to realize he can live with conflict about educational issues.

Who Trusts Politicians

Is there distrust between educators and politicians? The answer is "Yes", in the opinion of Assemblyman John Vasconcellos of California. Writing in the May/June, 1974, issue of *Compact*, a bimonthly publication of The Education Commission of the States, Vasconcellos raised the following points when he was pleading for something to be done about the distrust between educators and politicians.

1. When educators come before legislative committees, they usually talk about such things as employee rights and benefits or things like structure and organization; they seldom mention the kids.

2. Today, the general populace and the legislators are more educated than was the case several decades ago. Consequently, both the general populace and the legislators are no longer willing to blindly take the word of the educators.

3. Too often the approach advocated by the educators, when they appear in the statehouses, is "just give us more money, and we'll make it okay."

4. The biggest problem between educators and politicians – the gap that must be bridged -- is the lack of personal involvement between the two. They don't know one another too well.

5. Legislators are not basically unfriendly to education.

If the conclusions noted in the two studies that I have referred to as well as the statements made by the California assemblyman are accurate, then what are we waiting for? The handwriting is on the wall – local school leaders must become more effective in their efforts to develop closer working relationships with legislators. During the next few minutes, I want to share with you some points that might be worthy of our consideration as we direct our attention to the issue of influencing legislation pertaining to collective bargaining for public school employees.

The Need to be Organized

The day of the lone wolf in effective legislative work is over. If local school leaders want to become more effective practitioners in the area of influencing legislative bodies, it is imperative that they be organized. The society we live in today is an organizational society, an academic investigation is not needed to support the following statement made by Etzioni in *The Organizational Society*

> "We are born in organizations, and most of us spend much of our lives working for organizations. We spend much of our leisure time paying, playing and praying in organizations. Most of us will die in an organization, and when the time comes for burial, the largest organization of all – the state – must grant official permission."

In 1970, Dr. Bill Pharis, executive secretary of the National Association of Elementary School Principals, spoke on the topic, "What's in it for me?" In his speech, he asked, "Why the sudden banding together?" He answered his question by stating, "The primary reason for organizing any group is that there are some things people can do together more effectively than they can do alone." This holds true as we attempt to influence collective bargaining legislation.

Communicating With Legislators

As we strive to work more effectively with our legislators, we must keep in mind that communication is the key or the major building block to successful participation. Our effectiveness on almost every point that we discuss or explore with our legislator will ultimately be traced to this activity.

In considering this important key or building block, here are some factors that are worthy of note:

1. The best approach is through the verbal context on a one-to-one, face-to-face basis with your legislator. If this cannot be arranged, call him on the telephone or arrange for a meeting where a small group will meet with him at his convenience to discuss the issue. If possible, such meetings should be back home in his district or at a time in the state capital when he's not too busy to devote adequate time to the topic.

2. Another approach that could be used to communicate with your legislator is through the written message. This could include wire service or letter. Of these two written forms, wire service is the better method in time of crunch. However, if there is no crunch, a letter may suffice.

The American School Counselor Association has prepared a flyer which deals with letter writing to legislators. It is noted that legislators pay careful attention to their mail. However, most legislators place little weight on form letters with identical

wording and petitions. According to the Association, the letter that will have the greatest impact is one that is carefully thought out and yet represents an individual's point of view concerning the legislative matter under consideration. The point of view expressed should have a personal ring to it. Provide information as to how a piece of legislation would affect your particular local school district.

Representative Morris Udall of Arizona prepared a list of "do's" and "don'ts" for the prospective correspondents. Some of the more timely ones are presented for your consideration:

1. First of all, address the letter correctly.
2. Identify the bill you're writing about.
3. Write in time to do some good.
4. Your letter has a better chance of greater impact if it's kept reasonably brief.
5. Give your own views. A form letter often gets a form reply.
6. Give specific reasons for your position.
7. If you have specialized knowledge on some issue, by all means write.
8. Be constructive; don't just say what's wrong with a bill; state what you think is the right way.
9. Don't threaten to campaign or vote against your man if he doesn't do what you want. Such remarks rarely intimidate a conscientious member, and they may generate an adverse reaction. And don't bother calling him names.
10. Don't pretend to have great influence.

In a legislative seminar conducted by Jim Kirkpatrick of the AASA staff, reference was made to the "C's" of communication. Some of the "C's" were:

1. Credibility: The legislator must have confidence in the sender.
2. Content: The message must have meaning for the legislator.
3. Clarity: KISS (Keep it simple, stupid).
4. Current: Make certain that the issue is still under consideration.

Don't forget the legislator after the matter has been dealt with. Notes of appreciation are always in order. On those occasions where your legislator did not vote "Right", a note expressing your regret over not having been able to communicate more clearly in regards to the issue is far better than acrimony.

The American Vocational Association has prepared a list of "Golden Rules" for those who work with public officials. In my opinion the principles espoused in the list have universal applicability to any person who works with legislators as well as other public officials. Some of the principles are:

1. Don't underestimate public officials. With very rare exceptions, they will be honest, intelligent, and will want to do the right thing. Your job is to inform them what you think is right.

2. Don't look down on government and politics. They may be faulty, but so is the teaching profession. A disdainful attitude is an expensive luxury these days.

3. Be understanding. Put yourself in the public official's place. Try to understand his problems, his outlook, his aims. Then, you are more likely to persuade him to do the same in understanding yours.

4. Be friendly, don't contact public officials only when you want their help. Invite them to be guests at meetings. Take pains to keep in touch with them throughout the year – every year.

5. Be reasonable. Recognize that there are legitimate differences of opinion. Never indulge in

threats or recriminations. They are confessions of weaknesses.

6. Be thoughtful. Commend the right things public officials do. That's the way you like to be treated. Any public official will tell you that he gets dozens of letters asking him to do something but very few thanking him for what he has done.

7. Don't blame public officials for "failing" to do what you wanted. The failure may be yours if you have not done a good job in preparing, presenting, and following through on your case.

8. Be cooperative. If a public official makes a reasonable request, try to comply with it. Don't back away for fear that "it's a deal", or that you're "getting into politics."

9. Be realistic. Remember that controversial legislation and regulation usually result in compromise. It has always been so and it will always be so in a democracy.

10. Be practical. Recognize that each legislator has commitments and that a certain amount of vote-trading goes on in a legislature. So don't chastise a legislator who normally supports you if he happens to vote against one of your bills. This doesn't necessarily mean he has deserted your whole program. Give him the benefit of the doubt: He will appreciate it and remember that you did.

11. Be a good opponent. Fight issues — not persons. And be ready with alternatives or solutions as well as with criticisms. This is constructive opposition.

12. Be informed. Never meet with legislators to advocate a position without first studying the facts and the arguments, pro and con. The mere fact that you want a legislator to adopt one position or another won't be enough to convince him. Do your homework. Remember that while some votes may be firmly committed, there will be many others that can be swayed on the basis of sound arguments that are properly presented.

13. Learn to evaluate and weigh issues. Many bills which are tossed into the hopper "by request" are never intended to become law. So, don't criticize legislators for the bills which are introduced, and don't call out the Army until you're sure a bill is serious.

14. Don't break a promise. This is a cardinal rule. If you tell the legislator you'll do something, stick to the bargain.

15. Don't change horses in the middle of the stream. Never leave a legislator stranded out on a limb by changing your position after he has publicly stated a position that you have urged him to take.

16. Don't participate in discussions about legislators being "bought" or "paid off". You have absolutely nothing to gain and everything to lose by engaging in such activity. Furthermore, chances are it will not be true.

Coalitions

According to Michael D. Usdan who prepared an article for the University Council for Educational Administration on "The Role and Future of State Educational Coalitions", "coalitions are common in the democratic process. In essence, coalitions are political groupings created to maximize chances for achieving commonly agreed upon goals."

In numerous states, educational coalitions are composed of members from the state association of school administrators, state education association, state school boards' association, state congress of parents and teachers and, in certain states, the state department of education. In other states, the coalition includes a number of lay organizations as well as all the usual professional groups. Ground rules are most generally established to guide and direct such educational coalitions.

Whereas the type educational coalition heretofore described is more or less a formal structure, oftentimes more informal coalitions are being found. Such informal coalitions usually do not meet regularly but do meet on an ad hoc basis to discuss specific issues such as collective bargaining for public employees. For example, in Kentucky,

representatives from the Kentucky Association of School Administrators and the Kentucky School Boards Association meet with representatives from the Chamber of Commerce, Farm Bureau, Municipal League, Associated Industries of Kentucky and other similar lay groups in an effort to defeat collective bargaining proposals. Such new lay group coalitions may come into existence as new and different problems and issues arise.

In the Campbell study, attention was directed to the topic of coalitions. The writers concluded that it is increasingly difficult for the interest groups to coalesce even on the heretofore common ground of school finance, there were five forces listed that have shattered alliances of educational interest groups, namely: collective bargaining, tenure, salaries, school finance, and certification.

Even though I concur with the conclusions reached by Campbell and others, I continue to believe that there are times – but not in the area of collective bargaining – where representatives from the various diverse interest groups can agree. As a result of such agreement, the combined resources could serve to be the force that results in significant changes being made in school finance legislation. Each of us has a responsibility to work toward such coalition activity wherever and whenever possible.

Role of Outside Authority

It has been said that an expert on a particular subject is an individual who is more than 50 miles away from his home territory. There is more than a grain of truth to this saying. There will be occasions when it will behoove representatives from local school leader organizations who are attempting to influence or defeat collective bargaining legislation to bring in an outside expert. The expert might appear before a committee of the state legislative body that is conducting hearings on collective bargaining. On the other hand the outside consultant might be useful as a keynoter or speaker at a regional or state-wide meeting of local school leaders. In such a role he might be brought in to acquaint the organization's members with the implications of bargaining legislation. On the other hand, he might be expected to stimulate the members to become more involved in the political process. Regardless of the role, the outside expert can and oftentimes does prove most beneficial.

We Are All Participants

This presentation has been predicated on the belief that we can influence collective bargaining legislation if we become more actively engaged in activities designed to result in our increased effectiveness with state legislators. Such activities are a must if we are to influence the legislators to make those decisions conducive to quality school programs.

In the past, too much credence was placed on the axiom that education and politics don't mix. As a consequence, educators have abhored the terms "politics" and "politicians". Now that state associations of school administrators are fast becoming educational planets in their own rights and not satellites of state education associations, it behooves each of us to realize that we can ill afford to leave the legislative actions to such associations. We must become active participants.

As we become more actively engaged in legislative matters, it behooves each of us to realize that we cannot act as lone wolves and expect to get the job done. Furthermore, we must realize that if we are going to become actively engaged in the political process, it means continuous participation and not a role assumed just at election time or when a burning issue is before the state legislators. Contacts on a one-to-one basis with our elected official (member of legislative body or the governor) are a must.

We want to keep uppermost in our mind that the number of local school leaders is not as great the number of teachers. Therefore, the financial resources available to influence legislation will be limited. Consequently, we must rely on other things. Credibility and information are both good starters.

At no time have I advocated that we should become involved in partisan politics as we attempt to enhance our effectiveness with state legislators.

However, I might add that I do not feel as adamant about this position as I did just a few years ago.

As we work to establish an effective communications network with our legislators, keep in mind the 4 C's: credibility, content, clarity and current. Moreover, the face-to-face, one-on-one approach is better than the written letter or telegram even though the latter forms will suffice in certain instances. Remember that it has been said, "It's the sizzle that sells the steak, not the cow."

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EA 008 383

The Influence of Cooperating School Districts in Defeating the Union Whipsaw

By Peter Goerges

"We must indeed all hang together, or, most assuredly, we shall all hang separately."

Ben Franklin to John Hancock. July 4, 1776

"Come on, Honey, everybody's doing it."

Overheard at a party at a midwestern university. April 28, 1965

The voice of a statesman for unity versus the seductive tempting of a college freshman; in many ways the same battle presently exists in public sector collective bargaining. Management can stand together and chart the course of area bargaining, or it can individually give in to the union negotiator. Whipsaw, seesaw, divide and conquer – such is the simple battle plan of the union. First, gain a demand in one district. Second, confront neighboring districts with the gain and establish a trend. Third, picture the final hold-out districts as arbitrary and unreasonable employers. The spotlight of public pressure is added to gain the concessions.

Peter L. Goerges is a chief negotiator for Ross Township and the Indiana, Hobart School Corporation. This paper was presented at the Annual Convention of the AEN in New Orleans, April 1, 1976.

Cutting Them Down

Internally, the school employer must build a strong management team, establish effective communications, review internal labor relations, establish a management data bank, evaluate union proposals, and continually build community support. Externally, the same building blocks can be utilized to defeat the union whipsaw. In Lake and Porter counties in Indiana, school districts have been cooperating since 1969 to defeat union whipsaw tactics through a university study council. While the model is not perfect, it has provided a means to develop an external power base for school employers.

Teacher collective bargaining found a ripe climate in labor oriented Northwest Indiana. A foothold was obtained in Indiana with master agreements negotiated through ignorance and intimidation in the early years. School corporations sought help and turned to the existing Study Council for needed services. The Study Council initiated a salary study for all school employees in 1969 for member corporations. To fulfill a need for training and education, the Study Council sponsored a series of workshops dealing with all aspects of labor relations. These workshops, held early in 1970, covered the following subjects: basics of bargaining, training the management team in collective bargaining, evaluating teacher demands, writing the agreement, implementation of board policy and the negotiated agreement, and grievance administration. After the initial training meetings, the school corporations, through their negotiators, met on a regular basis to exchange information. Currently, the negotiators meet bi-monthly to collect data, exchange teacher proposals, detail weekly negotiations, and report tentative agreements. The relationship remains informal but structured in the services provided and has given rise to cooperation in attacking other school related problems.

The following are services provided by the cooperating school districts which have helped to defeat the union whipsaw:

1. *Education and Training.* In dealing with experienced union representatives, it is essential that management be represented by individuals who understand the negotiation process and who have received training in all aspects of labor relations. Certainly the mistakes made in negotiating initial agreements will be perpetuated in the future; therefore, this cooperation in providing workshops should begin as early as possible. As noted previously, the Northwest Indiana School Study Council (NWISSC) initiated cooperation between districts in labor relations by sponsoring a series of workshops in labor relations.

Area cooperation is useful because inexperience and incompetence in another school district will be visited upon neighboring districts through the whipsaw process. Conversely, strength and expertise in an adjoining district will strengthen the firm bargaining posture of its neighbors.

A continuing in-service program by cooperating school districts can provide an increasingly sophisticated forum for the exchange of ideas and theories.

2. *Area Data Bank.* The best defense against the union whipsaw is the development of an accurate data gathering system to provide a thorough analysis of area standards. In Northwest Indiana the quality and breadth of information has improved each year. It is important to first survey the needs of the component corporations to determine the type of data and procedures to utilize. In the NWISSC survey the following data has been compiled: a salary survey including all steps and degree lanes; extra duty salaries and the number of positions; group insurance programs – life, health and hospitalization, income protection, dental; grievance procedure steps; contractual clauses such as class size and preparation time; unpaid and paid leaves of absence; no strike clauses; and severance and retirement provisions. This information is invaluable during table negotiations and mediation. It also serves as the basis for a comprehensive fact-finding brief when required.

Additionally, the NWISSC developed a complete Contract Book containing the agreements of the component corporations, subdivided by subject area. This document has aided in developing, and sometimes avoiding, contract language. Further, the Indiana School Boards Association has explored

the possibility of a computerized data bank to store state-wide data.

At the bi-monthly meetings the negotiators discuss and distribute internal union bulletins and strategies. Last year one of the negotiators intercepted a three-year negotiating plan of a labor organization which later proved to be authentic. In early 1976 a bulletin was intercepted which mapped area union strategy for this bargaining cycle.

Bargaining trends can easily be discerned from the bi-monthly discussion meetings.

3. *Arbitrator, IEERB, and Grievance File.* The school corporations have developed a file showing the "track record" of area arbitrators. Additionally, arbitration awards are compiled by subject area for use in administering the contract.

The group is on the mailing list of the Indiana Employment Relations Board to keep abreast of hearings at the state level which affect the local area. Members also keep informed of area unfair practice complaints. Factfinder decisions are monitored and reported in detail.

4. *Strikes.* The first significant teacher strikes in Indiana occurred in this northwest area. Gary, Hammond, Merrillville, Griffith, Highland, and Kankakee Valley have experienced teacher strikes. The Merrillville strike in 1972 and the Highland strike in 1973 were discussed in detail, with a complete report presented in special meetings. A strike manual has been developed based upon the area experience. Also, school corporations have shared substitute lists and sample PR releases.

5. *Management Team.* The various cooperative ventures have involved all members of the management team to build a solid power base. To insure competitive salaries for managers, administrative salary surveys have been continually updated since 1969. It is important to include middle management in labor relation decisions.

6. *Noncertificated Employees.* Indiana passed a pro-labor bargaining bill covering noncertificated school employees. The NWISSC developed a salary and fringe benefit survey for food service employees, custodial and maintenance employees, and secretarial and clerical employees. Additionally, a Contract Book has been developed for the three service employee categories.

Unit and Representational Proceedings of IEERB have been closely monitored, particularly where area schools have been involved. Fortunately, a local circuit court in Benton County declared the law unconstitutional and enjoined the IEERB temporarily, relieving local districts of increased problems in labor relations.

7. *Legislation.* The group has a keen interest in proposed legislation having an impact on employee relations. During the 1976 General Assembly, the 16 Lake County school corporations joined together to lobby a supplemental financing tax bill. The effort was successful in spite of stern opposition from the Lake County Democratic "machine".

The school corporations have explored future lobbying efforts for the 1977 Session.

New legislation is reviewed in detail by the group to keep abreast of changes in employee benefits and labor relations.

8. *Related Problems.* The NWISSC sponsored a meeting with an industry executive to discuss the impact and implementation of OSHA. The group examined the proposed Title IX regulations and shared documents implementing the new law. Likewise, the group exchanged material and policies implementing the Family Rights and Privacy Act. Lawsuits are usually discussed at the meetings of the group. Many legal issues are raised with the attorney-negotiators who are present.

9. *Caveat.* Management cooperation between districts will provide a defense against the union whipsaw tactics, but weak school boards and administrators will continue to play "Santa Claus" and make it difficult for those districts that choose to protect the management position and the public.

No Leaks Here

Confidentiality is a necessity due to the candid and private nature of the information shared. In the group, strategies and final bargaining positions are discussed. If administrators in a local school district cannot be trusted to treat this information confidentially, they should not be invited to attend this type of meeting. Also, if a union knows of the existence of a management data bank, it might pirate that data under NLRB standards relating to the right to information.

It is inadvisable to rely solely on the external organization while ignoring the building of a strong management team internally. Individuals or a school corporation must assume a leadership position in directing such a cooperating group; otherwise the meetings will degenerate into a BS society. Also, a good mediator is sometimes needed within the group when relations are strained between school corporations. The local cooperating groups should cooperate fully with state school board and administrative groups in forging a concerted management position. Lastly, it is particularly beneficial to locate a meeting place in a restaurant with a good bartender.

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ED125059

EA 008 384

Management Techniques for Influencing the Union to Accept a Settlement

By Dr. Roy J. O'Neil

Like you, I've been at the bargaining table, crossing picket lines, in legislative halls, in smoke-filled rooms, in arbitration, mediation, factfinding, lecturing, studying, conferring, writing. I've been libeled, survived strikes and personal attacks upon myself and my family and even endured an air raid of slanderous handbills by a statewide teacher organization. I've been in debates in emotionally-packed assembly halls, in courtrooms, caucus rooms, and in judges' chambers.

The point is this: I have been where you have been. And I share your concern for where we are headed next. The topic assigned to me for this presentation deals generally with where we're headed next. What are the ways, the possibilities for influencing the union to accept a settlement?

That's really the name of the entire game of bargaining, isn't it? What do you need to do to get a settlement? Especially when you know all the while that a "settlement" is never really that – but instead, it's only the beginning point for newer and more soaring demands only a few months ahead.

As I approached the matter of preparing to discuss this with you, I began keeping a file of notes relating to the topic of this talk.

Dr. Roy J. O'Neill is president of the Countersearch Corporation of Aurora, Illinois. This paper was presented at the Annual Convention of the AEN in New Orleans, April 1, 1976.

An anecdotal file of little gimmicks and tactics which I've used from time to time in various situations. I'll share some of them with you. But first, I want you to know that there's a more far-reaching set of principles or a strategy which exists and which we will examine here today. In the meantime, then, these smaller tactics do exist and are useful from time to time, in varying situations.

Start with the Truth

Keep in mind that these are only tactics, not larger strategies. For openers, I'd suggest the tactic of the truth. It's very important, in my judgment, and it can be used over and over. In fact, the more regularly it's employed, the more dependable it becomes, as a means of convincing the union that settlement at a given point is appropriate.

The tactic of the truth consists essentially of conditioning the union to expect you to tell the truth. This is done by telling the truth. Oh, certainly, we can't tell them everything we know. But we can, or should, be able to speak truthfully on matters that we do talk about.

Your credibility is important. It isn't necessary to call the adversary a liar, when it's obvious that he is lying. If you've conditioned the other side to expect you to tell the truth, the differences between what you say and what the adversary says may speak for themselves. Reinforce your commitment to the truth. It's the best friend a person can have.

Another tactic I've used, as you might expect, with a substantial level of success is the offensive counterproposal. By offensive counterproposal I mean a counter to a bad union demand which is offensive, as opposed to defensive, in nature. There are several examples of this which we can get into later, during questions and answers, if you're interested. There are several other caveats which I'll mention, although only briefly, because I expect that you're quite familiar with many or most of them.

Tape recordings of negotiating sessions or keeping minutes in as great detail as possible has many times become the one single precaution which has turned the tide in the final hours.

Know the enemy. Know the members of the bargaining team — where they are on the salary schedule, the seniority list. Which benefits they have used (sick leave, maternity leave, major medical, etc.) and what their family situations are. It's been helpful at times to know other things, such as husband's or wife's employer, combined income, or personal preferences. The reason these things are helpful from time to time simply is that when you've satisfied the members of the bargaining team, they're going to be more effective in selling the package to their members.

Recap for them everything they've won over the past few years. Surprising as it may seem, members of the teachers' team often are very ignorant about what items have been given by the board during recent past years. Items such as the cumulative percentage of their increases — both in salary and in all economic items. Let them crow about things like that to their constituents.

Let them claim they've won more than most people realize. That all helps your position. Once, just this very effort on my part brought a quick settlement that I really didn't expect. It was just a matter of saying "That's as far as we can go this time, guys. But look at where this will place you as compared to only three years ago." I had prepared some summary statistics that they simply had not bothered to consider before. It was presented from their point of view: "What *we've won,*" rather than from an attitude of "Look at everything *we've given you.*" Their attitude changed abruptly, and we signed an agreement within 30 minutes. But as we noted earlier, these are just tactics. They can be exceedingly important. And we've considered just a few of the hundreds of similar tactics which are available. You know many more.

I propose to move our considerations to a higher level. An overall view of strategy, a Gestalt, as it were, of what is the total picture of negotiations and what leads to ultimate persuasion of the teachers' organization that a reasonable settlement is necessary.

How successfully a school board completes negotiations with its teachers is determined by the training, experience, and competence of its negotiator. Right? Not in my experience. I've found several other factors – some of them entirely beyond the control of the board's negotiator – which often have greater importance than skill at the bargaining table.

Granted, the chief negotiator usually is *the* most important individual involved in successful negotiations. Moreover, his skills hopefully may extend *beyond* the table and into other areas which greatly influence events *at* the table.

Six Primary Factors of Success

From our experiences in bargaining with teachers over several years, I've identified what I believe to be the *six primary factors* which control, from the board's point of view, the success of negotiations. (Successful negotiations, for the purposes of this discussion, means the conclusion of negotiations within contractual limits which compromise neither fiscal nor statutory responsibilities.) Those six factors, in order of their importance, are:[1]

1. Constraints of Law
2. Union Determination
3. Integrity of Board and Administration
4. Quality of Communications
5. Negotiator's Skill
6. Ability to Pay

Let me give some brief descriptions of each of these factors:

Factor No. 1: Constraints of Law. This means the extent to which statutes require boards to negotiate and/or compromise matters of public policy with employee organizations. It is possible, under some of the very liberal bargaining laws which have been enacted, that this factor alone may void any reasonable opportunity for successful negotiations, as defined.

For that reason we assign to this matter the prime rank in our taxonomy of success (or failure) factors. Under the broad privileges bestowed by some legislatures upon teacher unions it has become obvious that the success of negotiations can be a matter determined almost exclusively by the union, regardless of what the board does or tries to do.

Because the operation and effect of this factor may be beyond any control by the board, the remaining factors could be inconsequential. In other words, it could be that there is little or no chance in some states to achieve successful negotiations from the public employer's point of view.

Factor No. 2: Determination of the Union. This concerns the extent to which the union is bent upon achieving highly ambitious goals which may lie beyond the willingness or ability of the board to meet them. If a union is determined to destroy a board to try to win its goals, it can do so. The level of union determination, then, may constitute a second factor which places beyond board control the achievement of successful negotiations.

Factor No. 3: Integrity of Board and Administration. The broad factor here includes many subvariables. Only one of them is the personal integrity or honesty of individuals in the management team. The larger aspect of this factor is how well the board and its administration are organized for effective functioning. How well does each person understand his role and the roles of others? How well does each perform his own role and support the others on this team?

Factors 1 and 2 lie largely outside the span of control of the board. This third factor, however, begins to fall largely within areas over which the board can exercise substantial control. Because of this, herein lies the basic potential for the board to do whatever it can or will to determine the level of success in negotiations.

Factor No. 4: Quality of Communications. Here is the essence of the product of sound board organization. Effective communication is possible only as the product of good organization. From integrity of organization comes effective communication. This factor, in my judgment, is *the fundamental determinant* of the success of the negotiator at the table: quality of communications.

Factor No. 5: Negotiator's Skill. The negotiator's skill ranks next to last among the six primary factors in our hierarchy. Skill at the table is important. The negotiator's skills away from the table may be much more important than at the table. For example, as a vital member of the management team, the negotiator's input into the communications network mentioned above may be far more important than what he says to teachers at the table.

Factor No. 6: Ability to Pay. There surely will be those who fault the placement of this factor at the bottom of the list. I stand by the choice of priority. Any school system which is unable to offer pay increases should, or could, be able to communicate that fact effectively if it has tended carefully to the factors over which it does have substantial control.

Several sub-variables also exist within this general factor. As an example, what happens when the ability to pay is practically unlimited, rather than next to nil? Even in such a case, resolution of the problem probably again reverts to Factor 4 – communications. Perhaps because a hierarchy of factors, such as we've just discussed, has not been widely considered, boards have spent too much effort in areas of lower priority while neglecting others over which they do have substantial control. Much more attention to those matters obviously is not only merited, but promises to return much better dividends.

When the smoke and dust have cleared following a teacher strike or other hard confrontation with a school board, the post-mortem usually will reveal *communication* to have been the single key factor which largely controlled the settlement. I believe this to be true with respect to either side – board or teacher organization – and to either side's perspective of the degree to which the entire confrontation succeeded.

It may humble the negotiator somewhat to know that his bargaining skills were not the deciding factor. Yet, our experiences confirm this finding over and over again in many difficult negotiating experiences. It's a lesson well worth extensive consideration by school management and especially by negotiators.

Often a board determines that it must obtain trained and experienced representation at the bargaining table. It proceeds to do so and then sits back, expecting that its troubles are over. Or, worse still, board members volunteer as coaches to help call the plays and run the negotiator's team. Too many chefs can spoil the soup as effectively as no chef at all. Either course spells trouble.

There is an important and appropriate role for board members and administrators in negotiations which is different from that of the negotiator-strategist. It centers in the vital processes of *gathering and disseminating information*, or in the area of communications.

Other Than the Official Role

The official role of board member, of course, may be defined quite simply. It is *to set policy, by means of his vote, which policy is executed by staff.* So, the official role of the board member is the same in negotiations as in all other aspects of school operation. The first job of the negotiator is to obtain board agreement on this role differentiation. A well-organized board and administrative staff will be accustomed to functioning in this manner.

If a board and its administrative staff are not organized with well-defined roles clearly understood and followed by each person, their chances of concluding negotiations successfully are diminished greatly. The level to which such organization is achieved determines the integrity of the management team or its ability to function effectively as a unit.

Once such organization is achieved, the product of the organization in negotiations is *communication.* The communications system is to an organization what the circulatory system is to an organism, carrying its life blood. If an aneurism occurs, there's a critical interference with proper function of the entire organization. The structure of the communications system in an organization parallels the skeletal structure of the organization itself. If the organization is not appropriately constructed its circulation and dissemination of information will be impaired to an important degree.[2]

Certainly everyone here long ago discovered that collective bargaining isn't the rational, rule-of-reason, exchanging of things of value, that unions claim it to be. There's very little genuine bargaining in CB. It's a game of decision by *reason of force*, rather than *by force of reason*. Negotiating essentially is a power game. The negotiator, really, plans and conducts the exercise of the board's power. He is a power broker, using communications artfully to position what power is available as strategically as possible.

The negotiator's most visible role is in *communications*, when he speaks for the board and the administration and the community with a single voice. An even more important aspect of his role is far less visible but still centered in communications. This is where he communicates – speaking and listening – with his management team and with the public that team represents.

The bulk of this communication often falls into the task of interpreting the meaning of organizational demands to his management team, but ultimately to the community. The purpose of this communication is to inform, to solidify, to integrate the identity of interests which exist between management and the public it represents. The negotiator communicates by advising, and being advised by, the rest of the management team and the community.

Keep the Public Informed

Lest anyone questions the importance of communicating with the community during impasse in negotiations, simply let him observe the tactics of the teacher organization at such times. Public opinion is their court of last resort. It is ours, as well. Whoever does the better job of communicating with the people is the odds-on favorite. Ultimately, a rule of thumb seems to emerge: that the side which comes to believe that its position is weak in the court of public opinion will be the side which becomes ready to settle – quickly.

Without exception it has been my admonishment to school boards I have represented that the most important discussions – and ensuing actions – will take place between the board, the administration, and the negotiator, rather than between the negotiator and the teachers at the bargaining table.

Before concluding, let's look at a few examples of the various kinds and levels of communication which typically may be involved for various members of the management team. Some are good, others are bad. Good organization will promote good communications; poor organization invites poor communication. Here are some examples of each:

1. A board member meets privately with a group of his friends on the faculty to discuss what is needed to get a settlement. (This is quite common. It's usually disastrous, too.)

2. An administrator tells a teacher that two board members are preventing the board from agreeing to settle. (This is always disastrous.)

3. A board member receives a call from a teacher regarding the problem in negotiations, and the board member listens. (This is good – listening. However, if the board member attempts to argue or to respond other than with nonsubstantive courtesy, it usually means only more trouble.)

4. An administrator tells the Chamber of Commerce manager exactly what the meaning is of what the teachers are demanding. (This is not only good, but essential communication.)

5. A group of citizens demands a public meeting with board members to discuss the problem. The board agrees to participate. (This is bad. I've never seen a single such meeting that was, in fact, a public meeting. They've been meetings attended only by press and by teachers' husbands, wives, children, in-laws, and their union busloads from nearby towns designed for media PR. Far better that the board should forestall such meetings by taking the initiative into its own hands and *communicating*, before the fact, in forums over which *it* has at least as much control as does the other side.)

6. A radio or TV reporter asks a board member or a superintendent for an interview on the

strike situation. The management representative sends the negotiator instead. (This ordinarily is the better way to communicate. The negotiator is closest to the situation and should long ago have been designated as management's spokesman or should have been designated as the person to advise the spokesman if it is a different person.)

7. Finally: A principal tells a teacher friend that the board would be willing to agree to settle; that it's really just the negotiator who's holding out. (I don't have to tell you how to communicate with that kind of team member.)

In summary: Negotiations is an exercise in power relationships. Power is generated by people. People are involved by sound organization. Organization operates through communications. And, the single most important factor, over which you have reasonable control and which most vitally influences a teacher organization to accept a settlement, is effective *communications*.

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[1]From *Countersystems*, January-February, 1976, Vol. III, No. 1. Countersearch: Aurora, Illinois.

[2]From *Countersystems*, March-April, 1976, Vol. III, No. 2. Countersearch: Aurora, Illinois.

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EA 008 385

An Informed Public: Its Rights to Information and Its Claim for Involvement in Influencing Management Decision Making in Collective Bargaining

By Edna Folz

Since I've been in the newspaper field for 30 years, I obviously believe in an informed public. It is necessary for a viable democracy.

We have, in the past few years, seen some frightening examples of what can go on in government when the public is not informed.

How many of you remember the Saturday Night Massacre? When Ruckelshaus and Richardson got the axe from Nixon. You got that uneasy feeling. And you, like millions of other Americans, were saying "what the hell is going on" as you were desperately hanging on to the TV tube for every scrap of information as the news was breaking the following Sunday. You wanted to know what was going on in your government – and I'll bet you felt strongly that you had a right to know. Did you not?

Well, public schools are part of government.

The right to know has strong roots in America – and so has the right of a free press to inform the people. Thomas Jefferson said if he had to choose between a free press and government, he would choose the free press.

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Many governmental agencies don't *like to part* with information – especially school boards. And especially at contract time. But the state officials... and local boards are representing the public. The people in delegating authority do not and should not give their public servants the right to decide what is good for the people to know and what is not good for them to know.

Some of My Best Friends

The people must be fully informed so they may retain control over the public agencies they, the people, have created. I have heard all the arguments – or at least a great many – why negotiations have to be private. Some of my best friends are former board members – they are also businessmen – and, of course, they contend you can't forcefully make your moves with the news media or public looking over a shoulder. There would be too many scars that would never heal.

Generally, the way the game is played – even when there's a strike – both sides come out winners. Management and labor smile into the cameras and shake hands. No one loses face. But there's also a good possibility the public has just been ripped off. They just don't know it yet.

With the scope of bargaining these days, the public may wake up some morning and find the AFT or the Teamsters are running the school system.

It is time to stop playing private games. I presume many of you negotiators are not persons directly part of the school system but, to use the vernacular, hired guns. Since I have never been in negotiation sessions, I only know what I've been told. But I gather it would not be good for public consumption.

Don't misunderstand me; I'm not trying to put you out of a job. The school corporations – and the public – need someone with expertise in the deluge of laws and able to write sound, tight contracts.

Move Over

However, it is time to let the public in. We, in the U.S., have definitely moved into participatory democracy. The public is ready! I can remember when I first started covering education about 15 years ago. I was sometimes the only person at a school board meeting besides the board members and necessary school administrators. Sometimes another newspaper reporter would drop in.

The Evansville-Vanderburgh School Corporation in the city where I work has some 30,000 enrollment, a $34 million plus budget, and with 2,500 employees is the area's *second* largest employer. It is also among the one hundred largest school corporations.

Today when that school board meets there are representatives of the teachers association, the Teamsters, who represent maintenance and custodial employees, representatives for the elementary and secondary principals, the Parent-Teacher Association, the NAACP, League of Women Voters, YWCA Education Committee, sometimes the Chamber of Commerce, and the Community Action Program. Some of these persons are more knowledgeable of the school system than many of the people who work there – *sometimes more than school board members.*

Many of these people are women who are not regularly employed outside the home, some are men who are retired. They give time to monitor school programs; they study the school operations; they serve on school committees; they attend state conferences; visit other school systems; they even study school finance and lobby at the state legislature.

Evansville's schools are desegregated by court order and therefore get a lot of Title 7 program monies, which require the poor, the black, and other minorities be represented on the committees that *set up and oversee* these programs.

Recently there were some changes on the school board because of criticism from the press, no less, and the public that the board was not being responsive to the public. The new board

president has named citizens outside the school corporation to committees on discipline, alternative programs, music, art, sports, cafeteria, and others. The school staff, of course, helped secure the citizen members.

Wouldn't you know; the male chauvinist school administration named nine (9) men and one (1) woman to the committees. The woman's committee? That's the one on sex discrimination. It didn't take long for the women in the audience to set him straight when he read off that committee at a school board meeting. However, there were no laymen named to the negotiations committee.

We Want to Listen In

It would seem that it would be to the advantage of the school administration to have open bargaining. Let the public to know what is at stake, what the finances are, what the school employees are demanding, and, of course, what the board is offering.

It would also be incumbent on the press to fully inform the public what the school board's offer means, as well as what it says, what the union's requests are, and what they mean.

I realize this is not easy. You probably don't trust the press, TV, and radio to properly explain such complicated matters. And I don't blame you! Sure we make mistakes. We try hard not to. But if the people on both sides are willing to present their cases in understandable English and be cooperative enough to answer questions, then everyone will get a fair shake.

Being outside the school system and dealing with educators, I can assure you the education establishment often takes a supercilious attitude toward the public – and that's not good public relations.

Thumbing through a school board journal recently, I glanced through an article on how to get financial issues passed by the voters. It was written by an education consultant. I quote: "School financial issues are won by meaningfully involved citizens. . .they are more credible in the neighborhood," and the author went on to explain some of the reasons. But, he added, "citizens need direction, and they shouldn't control the campaign."

The author holds that the citizens know even *less than* educators about campaigning. . .and, therefore, a school administrator should be given control and would "work harder or smarter or both." But he adds, "Unfortunately, this is something most citizen volunteers won't tolerate."

Well, can you blame them. Can't you see the politican who has been running his precinct for the past 20 years, probably helped get the school board members elected, and has some PhD. educator, who probably doesn't know the area, running the effort. It is this kind of attitude that can turn off the public.

But if the educators would work cooperatively with the public – then take them into confidence, it would be much better. For instance, most parents are favorable toward teachers – they want their children to have good teachers, and they want them paid a decent salary. The parents also know their kids aren't angels and have a certain sympathy for the teachers.

But when the teachers – as an organization – begin to seek salaries that are out of line with the community level for professionals, when they demand more and more time off for personal and business leave when they have three weeks vacation during the school year and a full two months in summer, and tenure, they begin to look into issues.

Then when teachers want to set the school calendar, determine class size, and run the school system for the benefit of teachers, the parents are not so sympathetic. And they want to be heard.

The political power of the teacher unions is also now being watched more closely by the public. For instance, in Indiana, there have been newspaper *editorials* about the many teachers in the state general assembly introducing and voting on bills that directly benefit the teachers, not necessarily the education system.

The NEA and AFT may be fighting among themselves now, but chances are still good that they will merge: a 2.6 million or more organization can have a terrific political wollop. And as you well know, they already announced their determination to control the criteria for the teaching field – and control the direction of education. They are fighting through the legislative process for agency or union shops.

Public Power

All of this you know better than anyone, but I simply mention it to stress the time is coming actually it is already here, that you need the public. We, the public, will be fighting for the control of the schools. And we know how to fight.

Look what the environmentalists have been able to do. Look at Common Cause, and I hope you are a member; forced court action in an early major victory in opening Watergate.

And, you saw what happened to the "common situs" or on site picketing bill. President Ford, last January 2, had to do an about face and veto the bill after promising he would sign it. The National Right to Work Committee has been credited for that. Probably 99% of the public never even heard of the Right to Work Committee. I've known about it but because that's part of my job. But being a liberal democrat, I simply thought of it as a right wing group.

Now I'm glad it was there – it garnered such support the President was getting 20,000 letters a day against the bill. The public had been aroused. And the Right to Work Committee had put on a massive campaign to stop the legislation.

In case you are not aware of it, the National Right to Work Committee has a comparatively new division called "Concerned Educators Against Forced Unionism," which is being led by a former teacher, Susan Staub.

I am not speaking against unions as such. Unions are a vital part of the American system. Workers have a right to organize, and it has been necessary for their welfare. But, if the system is to work, there has to be a balance of power. That's a crucial element of the structure.

You are responsible to the public to see that that the public remains in control of the public school system and that you do not give away the public control of public education at the bargaining table. And, to insure that, you need the public's help.

We have the right to know, the right to participate. *But you are going to blow it* if you and the school boards – who are our representatives – continue to consider negotiations your *private back room game*.

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An Informed Public: Its Rights to Information and Its Claim for Involvement in Influencing Management Decision Making in Collective Bargaining

By Barbara Jackson

We have before us a really important set of questions which I will try to look at from a personal rather than a scholarly point of view. For the last twelve years I have been active in citizen groups in three American cities. On the whole it has been a heartening experience. I am convinced that we now know how to do some of the things that need to be done, if the various constituencies of the public schools will work together.

That implies my answer to the first of the questions before us, doesn't it? Yes, I believe the public has the right and the responsibility to be well-informed. Public schools are financed by the entire community and ought to serve the entire community. They cannot do so successfully without speaking with and listening to that community. Take one problem – that of the all-too-common child who comes to first grade unprepared to learn how to read. We really need his parent's and neighbor's help in the years before he/she enters school if the school is to be the best learning place for him/her. *Somehow the school must get rid of its definition as a place set apart from the community, run by "them", and become* known as "our" school. I recall John Muzio, then principal of the oldest school in Stockton, California, in a rundown neighborhood of great poverty,

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going out to visit all the families of his school, taking the locks off the playground gates, and encouraging PTA teams to visit homes and enlist the advice of all the families in planning for the life of the school.

Fair Oaks Success Story

There's more to the Fair Oaks School story than that. I invite you to look further into it as an example of the kind of public and professional cooperation I think necessary for the health of the public schools. This school boasted an unusual three part policy-making structure. No policy went into effect until agreed to by teacher, by administrators, and by the Parents Committee. The Parents Committee was open to any parent, but its regular participants numbered some fifty persons.

The first principle agreed to by the three groups was the simple one, "Every child can learn", but it implied a commitment by all concerned to find the way for each child to learn. There was an interesting discussion about one principle. The teachers proposed that there be no physical punishment in the school. The parents counterproposed that there be no "degrading" punishment. They argued that some words could be more damaging than a blow. The teachers agreed to the parent's wording as being a better expression of what they had hoped to establish than their own words had been.

When the principal was asked if the school would accept the bus-in students of a voluntary racial desegregation effort, he referred the question to teachers and parents, and it was only with their approval that he consented to take in the suburban children. Bus-in parents were invited to join in parents' committee meetings, and the two groups soon found themselves to be one unified by a common desire to establish the best of schools.

When a neighboring junior high was beset by racial conflict, it took a page from the Fair Oaks book and called in parents: black, white and chicano. By the next day, parents patrolled corridors and playground, and the students were ready to work with school counsellors in organizing better human relations within the school.

I don't want to cite Fair Oaks as a paragon, but it was an unusually happy school which was also effective as a teaching instrument. Its number one problem was one of special interest to you. The city teacher's association found the flexibility and shared decision-making of the school very, very threatening, and were able, eventually, to erase some of the innovations that were important to its effectiveness.

Parents Are Needed

Looking back, I wonder what would have happened if the public had some role in collective bargaining. Wouldn't the school administration have held a stronger hand if they could have cited public support for experimental school models? If there had been a parents committee, perhaps, at the district level?

Fair Oaks developed an enthusiastic corps of volunteers who worked in the school at a variety of tasks ranging from teaching special language classes to accompanying classes in library or zoo excursions. One suburban mother once scolded me when I was talking enthusiastically about our volunteer work. "No wonder," she said, "You people at Fair Oaks have lots of volunteer help. So many of your parents are on welfare. Out here both parents work to pay off our mortgages. We haven't time to volunteer." There was just enough of a grain of truth in her statement to make me pause to think. One, a lot of poor people, whose education level is rather low, still have valuable gifts to offer children and can make a good contribution to the life of a school. Two, it is sometimes middle and upper income families who now have the least time for schools and children. In such neighborhoods we may need to find new strategies to enable them to participate in school life.

I do want to argue for the value of such participation. It can do much to enrich the school. A remarkable example of such enrichment is written up in a January, 1976, *Phi Delta Kappan* article, which describes an after school activities program funded and run by the Orange, Connecticut, PTA. Begun on a small scale in one school, the program is now available in all *five* elementary schools of the district, offering gymnastics, batron-twirling,

wood-work, ceramics, cooking, photography, theater, and nature study among its activities.

Such a program does more than enrich the life of a single school. It illustrates a truly effective way of informing the public about its schools. A study made by Edward C. Lambert and reported in the December, 1975, *Phi Delta Kappan*, asked respondent's *sources* of information about schools. These were reported thus:

pupil and other comments	(35)
other (experience as parent and/or teacher, discussion with teachers or administrators)	(28)
comments by friends	(24)
newspapers	(19)
magazines	(14)
television	(11)
PTA	(9)
radio	(7)

I think our own experience would be similar. It means that few of our towns are lucky enough to have newspapers like Edna's that encourage a specialist reporter to report and interpret school news. We depend on personal school connections. The quality of that human connection will determine what we think about the schools.

The School's Drop Out Problem

Contemporary attitudes toward schools are such as to require that we take drastic steps to restore communication and cooperation between schools and the public, according to "Gallup Polls of Public Attitudes Toward Schools." You have copies of three quite different newspaper clippings. Each illustrates a serious alienation of schools from their communities. Stuart Sandow, of the National Committee for Citizens in Education, puts it in even stronger words in his review of Mario Fantini's book, *What's Best for the Children*, (*Phi Delta Kappan*, p. 569, 70, April, 1975.)

> "And so we have it: In the past 10 years, parents have been squeezed out of the public schools. They aren't asked for anything but their money, and they aren't listened to until they scream, out of frustration and despair. Teachers have organized, and with their focus on better pay and extended benefits, the reasons for teaching have often been lost in the shuffle. With so much money coming from outside the community, local school people have stopped bothering with local advice and concerns. Authority is shifting: Publishers who sell books decide what they will teach, and the atmosphere in which kids learn best is destroyed in the tension we now see in the schools.
>
> "If teachers must organize to assure their aggregate benefits, the level of decision making about how and what to do with kids will also move further away from the classroom and the school. Alternatives will decline, teacher initiative will be lost, job satisfaction will collapse, and a professional monopoly will freeze out the only support they could have turned to – parents – and the system of schooling we cherish will be dead. The politics/economics which have determined the rules of the game are about to bankrupt the players, unless we can convince those players that they should separate the pursuit of obvious benefits from the enormous costs to our kids."

Always on the Defensive

Angry words. The kind of words that are elicited by the manner in which many a parent concern is dealt with by a school or a school board. We need to rescue the school board and principal from feeling so beleaguered that their attitudes are always defensive. Several problems must be dealt with. One of them is our inability to guarantee any educational program.

At the present state of the art we do not know for sure how to accomplish even the goals we can agree on. I think we need to be honest with the community about this. Part of their frustration stems from the suspicion that the schools know how to do the job and won't. Again, bringing people from the community into the decision-making process will help to increase understanding of the complexity of the challenge before the public schools.

Another problem is our natural human jealousy of our prerogatives. That cuts two ways. It is appropriate that school board members be cautious about sharing their decision-making powers. It is natural that a principal share that caution. It is also natural that the community insist that when it is consulted, its reports and comments be taken seriously. I am a member of a regional advisory committee for Title XX, and all of us on the committee are fed up with the window-dressing role we feel we have been sucked into. That sort of disillusionment does a program no good.

A third consideration, not really a problem of itself, is the need to be open to public criticism as possibly being valuable. When an issue of *Your Schools*, the publication of the American Friends Service Committee, an office to monitor the process of school desegregation in South Carolina, said our local school district's discipline code was not in compliance with state law, our school officials told the local press that *Your Schools* was wrong, only to have the local newspaper print the *Your Schools* article, word for word, with the state law in one column and our offending corresponding rules in the parallel column. The school board met and changed the local rules, but their credibility was seriously hurt by their first, angry response to criticism.

The New York Times article about the funding of sports programs illustrates a school board attitude that can only alienate the very public it is called upon to represent.

If schools continue to be seen as the exclusive domain of teachers and administrators (at war), the public will be reluctant to fund the activities "they" carry on as education. Mr. Sandow is, I believe, correct to speak so gloomily.

Committees Aid Involvement

What do we do about it? Edna has mentioned a promising Evansville strategy – one that I had planned to recommend – only to find myself behind the times. Community committees to explore questions before the board of education ought to be a useful step toward understanding cooperation. Such committees would increase the board's ability to understand community needs. If there is anything we have learned in the past twenty years of civil rights activity, it is the ease with which one part of the community can be unaware of serious problems in some other part of the community. In the long run we can be grateful for every unpleasant confrontation before school boards. Stockton, California, like many a city, has changed its way of electing its school board, to assure neighborhood voices can be heard before angry confrontation is required. Evansville, Indiana, has been trying out ways to allow greater community input ever since the days of Wilmer Bugher's effective superintendency.

Another example of fruitful cooperation is found in *Fair School Finance*, published by the Citizens's Coalition on South Carolina School Financing. The Coalition was initiated by the League of Women Voters and counted the AAUW, AFSC, Christian Action Council, Columbia Urban League, S. C. Conference of Branches of the NAACP, S. C. Congress of Parents and Teachers, the Chamber of Commerce, Farm Bureau and the South Carolina Education Association among its members. The combination of speaker's bureau and publication has helped significantly to alert the state to the need to re-examine school finance.

A governor's Study Commission was formed last year, and their report had led to the introduction of a promising bill in the legislature. The governor's support, as Dr. Williams noted this morning, is important. I want to stress that his support had to be won by a good show of citizen interest.

Wilson Riles, state superintendent of public instruction in California, includes the involvement of students, parents, staff and others in the decision-making process at school level in the plan for the reform of California's intermediate and secondary schools. This plan also calls for the advice of

students, staff and community in the process of selecting new school personnel. It further calls for utilization of material and human resources in the community to broaden the learning programs in the schools.

This program of reform is being coupled with a new test, The California High School Proficiency Examination, which will parallel the high school diploma. Students who pass the exam may go ahead and leave school, to enter college or the work force. Superintendent Riles seeks also to establish a certain level of competence, together with a marketable skill, as a requirement for a diploma. The New York Regents have just passed a requirement in reading and mathematics proficiency for high school graduation. Britain has had such tests for years. *Such clarification of goals and recognition of the common concerns of schools and communities are very promising.*

Our task, then, is to further the development of meaningful and effective cooperation between schools and their communities. I have no doubt that such community participation will be brought into collective bargaining itself, but I think the first efforts of our schools will be directed toward increasing community participation in policy-making and in actual school life.

Such developments follow different timetables in different places. Many of you may work with school districts which may need to get to work at once on gaining the strength of community support. As Dr. Williams pointed out, the number of school administrators is not equal to the number of teachers, but parents and future employees and restive taxpayers are a very numerous body, and they really do care and should be given a chance to participate in building the effective schools we truly cannot afford to be without.

We ought to make very serious use of the annual "Gallup Poll of Public Attitudes Toward Education." In 1975 the Poll showed the public to consider "lack of discipline" to be the major school problem. Like every one of the problems listed as the top ten in importance, this problem cannot be solved by a school acting above. Joint efforts between schools and a variety of other community organizations are needed to find the causes and the solutions of the discipline lack.

The 1975 Poll also shows a definite drop in public confidence in the schools.

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Presenting Your Case to Influence the Decision of a State Labor Relations Board

By Donald Russell

I've been asked to tell you how to win a case before a labor board. The first thing to remember is that, no matter how skilled you are, you can't win all the cases you try before a labor board. In every case there is a winner and a loser.

That statement is so simple it almost seems ridiculous to make it, but I make it not to remind you that you could lose a case before a labor board but to be sure that you make your client realize from the very beginning that there are two sides to every case and that even the best advocate cannot make a silk purse out of a sow's ear.

Too often I find that advocates who will try a case before a board have not sat down and explained the realities of life to their clients. As a consequence, the client is naively believing that the case that's being heard is one which he is almost certain to win. Then, much to the client's chagrin, he finds midway through the case that the other party had a great deal more to talk about and a great deal more evidence to present than he ever imagined could be presented in the way he originally viewed the case.

One of the very first things you should do in dealing with any labor case is make your client appreciate that there are two sides to

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the question and never, never, never promise to him a certain result. You can never be sure on any case that you will win it.

Usually when you begin on a labor case, the facts and the law are already settled and established before you ever hear the case. You, as a consultant, or as an attorney, to a party in a labor case have little or no control over the facts and the law, and this situation points out the very first thing you should do.

Do maintain, wherever possible, day-to-day relations with your client and keep in touch on an ongoing basis with what is happening in the client's situation, because the best time to control and win a case which appears before a labor board is before the petition or complaint is ever filed.

An example of this is the case of unit determinations. From the point of view of management, there is little reason to ever have a totally bad unit determination against the management side. The administrators could take actions and establish sound personnel practices that will decide the case before a case is filed. These practices would almost always lead to a good result for the management side. Yet, we see in one unit determination case after another that the parties, and particularly the employer, have done nothing to alter bad practices and establish good practices which would provide a sound factual basis for reaching the unit determination that's requested by the employer before the labor board.

Better Late Than Never

Once a case is filed before a labor board in which a union is seeking a unit determination, it is too late for the employer to do very much that will affect the result of the case. Quite frankly, hearing officers give little or no weight to actions taken and documents developed after the petition is filed. A job description that is prepared for a unit determination case has little or no weight in the outcome that is to follow. Moreover, a job description that has been written ten years before, but which has never been followed because of loose personnel practices, is also of little or no weight. Hearing examiners are interested in what actually occurs, not what is assumed to occur. Likewise, the development of a new special procedure to be used in the discharge of a teacher for the first time in a disputed case is more apt to be viewed as a railroad job than it is to be viewed as fair treatment of an employee about to be discharged. This kind of a procedure should have been reduced to writing and followed religiously in the past before it's going to be given any kind of weight in the instant case in which you are involved.

I recognize that outside consultants and attorneys usually are handed a fact situation and a legal situation over which they have had no past control. On the other hand, a school board attorney or a personnel manager for a school system is involved on a day-to-day basis with these kinds of questions and should be looking toward the possibility that these matters may, at some point in the future, lead to an unfair labor practice complaint or be involved in a unit determination decision. Good sound personnel practices, written administrative directives, and school board policies are the best way for a school board to win a case even before the day the petition is filed with the labor board. The result of most cases is decided when the petition is filed, by irrevocable actions already taken.

However, let's not consider the water that's passed under the bridge. Let's talk about what you can do to influence the result after the petition is filed. All you can do is be sure that all the good parts of your case are presented clearly and forcefully. That's how you do the best job for your client. Sometimes a well constructed, pig-skin purse may be more than the other side can put together. Let's explore what you do and what you don't do to get the result.

Know the persons who will decide the case. I say persons because cases will involve board investigators, hearing officers and examiners, and the labor board. In addition, there are always the courts. All you really need to do is win the last round, not all the rounds.

Therefore, you should remember that boards differ in their approaches, and this reflects in how a staff handles a case. It makes a difference if the

board has all statutory functions or the responsibilities are split. The federal situation has an NLRB, FMCS, and administrative law judges. The functions of unit determinations, unfair labor practices, mediation and conciliation are divided among different people. Some state boards are set up like this, either by separate boards attending to these functions or by separate distinct divisions attending to these functions. This tends to lead to a narrower approach to the case and more emphasis on making a decision on the case, while less emphasis is placed on settlement of the case. Other boards, such as in Indiana, have responsibility for all the functions in labor relations, including unit determinations, unfair labor practices, mediation, factfinding, and arbitration of contract disputes.

I recall putting the final touches on a contract with the carpenters one morning while we kept an NLRB law judge waiting to start an unfair labor practice. The NLRB trial attorney came in and noted that we were still working on the contract and not on a settlement of the unfair labor practice. He asked if we couldn't finish the contract that night and get started on the trial of the unfair labor practice because we were keeping the judge waiting. Everyone in that room except that NLRB trial attorney understood that the settlement of that contract was the key to the settlement of the unfair labor practice. Why did he not suspect that? Because, he never mediated a settlement but relied upon the law which says dismissal of an unfair labor practice cannot be a condition of bargaining. In the real world, it is every day. Another example, we have one super mediator in Indiana whom we sent to function as a factfinder after some unsuccessful mediation. At the same time, there were several unfair labor practices pending in the school corporation. This individual not only settled the contract; in the process he settled everything he could find lying around the place including the two unfair labor practices.

What I'm saying is that the position that you will want to stake out in a case may very well depend upon whether you feel you may be asked to settle it. In Indiana, for example, half of the unit determinations were settled without hearing examiners' decisions. The general practice was for the teachers to ask for all the people in the unit and the school board to do very nearly the same thing. As a consequence, unit determinations ended up more a negotiations process than a procedural unit determination type of process. Where there was no settlement, then generally the parties would drop some of the more ludicrous positions that were really posturing positions and narrow their case down for the hearing, to the real and tenable positions. This wasn't always the case, but it tended to be how the matter would work. In short, sometimes you should approach a case as you would negotiations, outside your ultimate position. This is very true in unit determination cases and less true in unfair labor practices.

Boards also differ in their approach to cases. Some boards tend to be very active participants in the unit determination or unfair labor practices case itself. The board itself, with its hearing examiner, and its staff tends to get involved and tends to take positions. It tends to fight to hold positions. Other boards tend to decide only the narrow issues which are presented to them by the parties. This first kind of board, the active board, will use its staff people to investigate cases; it may on its own initiative investigate and file unfair labor practice charges or initiate rule changes. They will take statements from witnesses, file and try complaints, and look very closely at settlements of unfair labor practices; sometimes will refuse to approve those. The NLRB will look at the settlement of a discharge case very closely, and unless a certain percentage of money is paid, as determined by the regional director, it will not approve settlement of the case. This is notwithstanding that the union, the discharged employee, and the employer may all agree that its a fair and an equitable settlement. The NLRB may interpose itself between the parties and not approve the settlement, and that settlement won't be approved.

Other boards, I'll call them judicial, let the parties present a case, make the arguments, and then the board or its officer decides the disputed issues only. The active boards may decide an issue by rule or by policy or by broad application. The judicial type of a board leaves issues open for all the parties in the state to settle among themselves, until the board is compelled to make a decision on a specific case with specific facts before the board.

It, therefore, is very important to know how the particular board you are appearing before views proposed settlements of the parties. Do they accept them or do they not?

Know the hearing examiner's background. We know that management and unions keep dossiers on us. They should. I think what you'll find, in most cases, is that the hearing examiner that you've drawn is intelligent and well educated. What, in essence, you have then is a hearing examiner who can be educated but is not necessarily experienced and educated in the area of your dispute.

Start from the Bottom

Therefore, assume that the hearing examiner knows nothing. School practices and policies vary enough from district to district that even hearing examiners who have worked in school districts as administrators, consultants, teachers or neutrals, still must be told what you do in your district. If you do not educate the hearing examiner as to the specific facts and their specific application in your school district, he can only draw upon general knowledge of the area in dispute. And, you might lose the case because you failed to explain to him how your situation is different. For example, in an unfair labor practice case involving discharge of a teacher for teacher union activities, if you are saying, as the defense in the case, that teacher was let go because he had bad evaluations, it's not enough to simply talk about evaluations and assume that a hearing examiner knows what you mean. It is incumbent upon you to explain how you do evaluations, why you do them, who does them, when they're done, how much the teacher knows, etc. Then, prove that you do, in fact, carry it out the same way in each case and how it applied to this specific teacher. Then, state this teacher was fired because his evaluations were low, just as we always fire teachers whose evaluations are low.

Don't assume that a hearing examiner knows all the law. You can assume he knows the law pertaining to the issue before you. But, he also relies upon you to inform him as to what you believe the law is and how it applies to the specific facts in this case. More importantly, some of the more complicated, complex school laws are not generally known to some hearing examiners. No hearing examiner is going to be offended by you providing him, in your brief or in your arguments or somewhere in your case, the citations to the law that you believe are applicable. Even if he is aware of that law, a hearing examiner would rather have you point out the applicable law to him than to miss it.

Do keep in mind that the hearing examiner is not the last word. It is important that you make a record with facts – facts as related by witnesses, facts as told by documentary evidence, and facts by other material evidence. Don't let a hearing examiner talk you out of introducing an essential part of your proof. He may think the point has already been made while you do not believe it has been, or he may tell you he understands that is the fact. The reason you go ahead and introduce your evidence anyway, even though the hearing examiner already understands the import of it, is that later on some court may be searching the record for the proof that you were required to make to support the hearing examiner's decision. Even though the hearing examiner rules in your favor, if you don't introduce the evidence to support his conclusion, the court will reverse him. Therefore, remember, you are pursuading the court at the same time you are persuading the hearing examiner, and it's important to remember that while you are persuading him you must also be making a record. On its face, it will persuade a person who reads it later on.

Read the law and the rules. Many practitioners get into trouble in hearings, over the simple failure to read the rules and to know the time frame within which they are to file pleadings. It must be remembered that an unfair labor practice in most cases must be filed within a certain statute of limitations. Likewise, it should be remembered, if you fail to answer an unfair labor practice charge before some labor boards within ten days, the board will deem your failure to answer as being an admission that the charge is true. Likewise, the time frame within which to appeal the decision for full review by the full labor board, after a hearing examiner has made a decision, is usually an extremely short time. In Indiana you are given only five days after the unit determination decision is

received by you in which to declare your intent to ask the full board to review the decision. Much more time is given for the preparation of the transcript, and all you're being asked to do in those five days is to send in one written sentence to the board indicating your desire to have the full board review the hearing examiner's decision. However, it's very easy to let those five days slip by and lose the right to the full review.

Keep Your Laws Straight

One of the reasons you read the law is to make sure that you don't bungle your case by arguing the law of another state. This sometimes happens. The thinking of the advocates is colored by what has been done in other states, and laws do vary enough that they should be read and reread in each case.

Do try the law if it's for you. That's very simple. It means that if the law is in your favor, use it and don't complicate the facts. On the other hand, try the facts if they are for you. This is generally the situation you are looking at because labor law is usually a pretty cut and dried situation. It's not hard to find the law that applies to most cases, but most labor cases, and particularly unit determination cases, turn upon the specific facts. Everybody knows its an unfair labor practice to discharge an employee for union activities. It is the facts and circumstances, statements of people and documents surrounding the discharge of a teacher that are the things that make up the mind of the hearing examiner as to whether discrimination was on the minds of the school board or their agents when the decision to fire the teacher was made. The hearing examiner, after all, cannot read the school board's mind and therefore can never know for certain if there was discrimination.

You can't see discrimination. You can only find that it is there, like electrons, by the effect it has on things around it. Rarely do employers express it in writing or orally. Actually the hearing examiner must look at all the objective facts and from those determine, in a subjective way, what the motivation of the board was when it discharged this teacher.

Do prepare your case immediately. This means that you don't wait around until the case is set for a hearing before you start to put together the evidence and witnesses you will use in the case. First, you may get yourself into a bind on time, and it will become necessary to ask for a continuance. You may or may not get the continuance because some hearing examiners and boards look upon them very unfavorably, especially when you have had ample time to prepare. Secondly, even if you get the additional time you request, it will not be a great deal of time. You may still have to put your case together too hurriedly and not be able to give it sufficient thought to make an adequate presentation. These are negative reasons as to why you should not wait to begin to prepare your case. More positive reasons are that by talking to the witnesses and gathering the evidence early, you will be able to gather the facts more clearly before the memories of the witnesses grow stale. Moreover, by early preparation you may be able to also obtain an early settlement by talking to the other side and settling the case, thereby saving your client the expense, time, and effort of an unnecessary unfair labor practice case.

Points to Consider

In preparing for the case you should do the following:

Identify the issue in dispute. Remember, if you are the charging party, only the issues charged in the complaint will be tryable, and if you are defending the case, you should keep in mind that you have only to defend yourself against the charges set out in the complaint itself, and not a lot of extraneous matter.

However, in the trial of the case, be certain that you object if the other side starts to prove an unfair labor practice which was not alleged in the complaint itself. If you do not object to the admission of the evidence, the hearing examiner could still find you guilty of that unfair labor practice, even though it was not specifically stated in the complaint. Keep your eye on the ball in doing your preparation. The ball is the unfair labor practice complaint. That is what you must hit. That is what you must drop in the corner pocket.

Find out what happened. Find out everything that happened. Find out with respect to every factual issue; who, what, when, where, why and how that matter was completed.

Establish what your position is. For example, in a discharge case, your position will generally be, the teacher did not meet the criteria of professional excellence that the school board established, and therefore the teacher was not granted tenure, or his or her contract was not renewed. Or, for example, I have taken the position that laid off employees were not rehired because an Equal Employment Opportunities Commission letter served by a government official required that the company I represented increase its number of minority workers. The two white workers in layoff status could not have been rehired, regardless of their union activities. This is the reason they were passed over and not rehired. Not because of their union activities.

Locate the evidence that supports your position. This will include all the witnesses and documents that support it. You should make a check list for yourself of the facts which you must prove, and set out beside each fact the name of the witnesses and the documentary evidence which will tend to prove that fact. If you make such a chart it will be invaluable to you. It may, if it's good enough, also be a great aid to the hearing examiner in reviewing the evidence once it has been presented to him. You should also put together a second check list of the facts which the other side must prove to make its case and then anticipate, as best you can, which witnesses will be used by the other side in order to make its case. In other words, you will be anticipating how the other side will prove its case, and it will put you in a better position for cross-examination and for presentation for your own direct and rebuttal evidence to refute his allegations. In almost every case, where the parties have to ask a trial examiner to permit them to submit evidence after the hearing, it is because they did not get through the process that we have just talked about.

Use discovery procedures where they are available. In some jurisdictions it is possible to take the depositions of witnesses before they go on the stand. This is the best thing to do with an adverse witness. You can find out what the adverse witness will say before he actually gets before a hearing examiner and makes the statement. It will put you in a position to have evidence prepared and ready which will refute his statements, if he should make them before the hearing examiner. In a minute we'll talk about cross-examination and I'll discuss my feelings about cross-examination of witnesses who are lying.

If discovery methods are not available to you, then get the witnesses in and take statements from them. Handling of adverse witnesses, particularly the complainant in an unfair labor practice case, is an extremely ticklish situation, so it cannot be done in a high-handed way. However, there is nothing improper about you asking a person to tell you what statements he intends to make at the hearing and to take those statements from him in an effort to defend yourself against an unfair labor practice case. This should be done with the assurance to the employee that regardless of what he says, there will be no reprimand for his testifying in the trial. Get every possible document and statement of adverse, and friendly, witnesses. You never know how one of these will help you. Keeping good personnel files helps here.

Do prepare your witnesses for the ordeal that they are about to undergo. Prepare them promptly and immediately, after you learn about the case, so that you can draw from their memories while still fresh. Then, later, after you have worked their original statement into a list of questions that you intend to ask them at the trial, go back and visit with the witness again and ask him the questions. The first time you talk to him, draw from him all that he knows; the second time you meet with the witnesses, you should be prepared to ask him specific questions that you will ask him in the hearing itself.

Is it proper to interview witnesses? Of course it is. It's not proper to tell witnesses to lie or to plant thoughts or facts in their heads. Be careful of witnesses who try to please you. They could hurt you. Each witness should be made to understand that you want him to tell the truth in the best way

that he knows how. He should be made to understand there is nothing improper about you asking him what his testimony will be if he is called as a witness.

Tell the witness not to wander from the question. He is to answer the question you ask him as shortly and as simply as he possibly can.

Don't use each witness to prove the entire case. Use a witness to prove what he can testify to of his own knowledge.

Tell the witness not to make assumptions. If he makes assumptions about things that he does not really know about, he may be totally destroyed on cross-examination.

Tell your witnesses to let you worry about the law and the briefs. Their job is to state facts not conclusions. For example, don't put a superintendent or a school board member on the stand and ask him if a department chairman uses independent judgment to hire, fire and direct the activities of other teachers. Rather, ask that person which teachers were hired last year, who interviewed them, and if the department chairman interviewed them. Ask him to pin down the dates that the department chairman interviewed them. Ask him to tell specifically who was talked to after the interview, and so on. Hearing examiners are not interested in witnesses usurping their power to reach a conclusion of law; rather, they are looking for the witness to state facts that will support a conclusion.

Tell the witness to stop when an objection is made to a question, especially if you are making the objection to a question on cross-examination.

Show the documents to the witnesses. Comb the document carefully so that you and the witness understand every part of it.

Prepare the witnesses for cross-examination. After the witness is asked the questions on direct, ask him the questions you expect on cross-examination. Tell him that he may be asked if he discussed his testimony with you and if you told him what to say. A truthful reply to that should be that you asked him what his testimony would be and that you told him to tell the truth.

Many of the most sticky parts of your case can best be explained by a well prepared witness on cross-examination by the other side. Emphasize the importance on cross-examination of not making assumptions about things he doesn't know and only answering the question asked without volunteering information, unless you have thoroughly discussed the answer he will give. It is not improper for a witness to admit that he doesn't know the answer. It's not the superintendent's job to know everything that happens on a day to day basis in a school. However, his credibility as a witness is destroyed if he assumes he knows and answers a question which can be proven wrong.

Each witness should be told that he is providing a piece of a total picture and that you will tie it all together in the end. After you have talked to all witnesses, seriously consider not using some of them. Your presentation will be better if it's shorter. Also you will find that some people make better witnesses than others. Use the best board member or principal, and eliminate the bad ones.

Do evaluate the case with your client as soon as possible after you have all the facts and law.

Do know what your authority to settle is. Find out what your client needs as a minimum from the case, just as you establish guidelines in bargaining. You never know when or where the opportunity to settle may present itself. It may be at a seminar, on a street corner, or during negotiations, a grievance procedure or an arbitration case. Settlement of labor cases is like settlement in negotiations – there is a quid pro quo. Often the trade-off for settlement is not within the case itself. It may well be another case or an item on the bargaining table.

Explore settlement with the other side as soon as possible before the claimant and his representative get too locked into their position. Prompt settlement of any disagreement is usually better. Last year I settled a teacher discharge in two hours by simply asking the president of the association what the teacher really wanted. It turned out she

didn't want reinstatement because she knew she had done a poor job as an instrumental music teacher. We settled for a letter of recommendation of her as a vocal teacher – a job we really felt she could do. In the process the school saved thousands of dollars in legal fees.

Do submit a pre-hearing brief. A pre-hearing brief, setting out your position backed with the law and the facts you intend to prove, is ten times more effective than a post-hearing brief. It starts the hearing examiner thinking your way, and he hears the testimony and reads the evidence with your position in mind. Too many people wait until the evidence is in before taking a legal position. As a result, the evidence does not fit their theory, and the hearing examiner has already begun to approach the case on the theory of the other side or on one of his own. I have had post-hearing briefs persuade me to decide differently than I planned as I left the hearing, but frankly that happens rarely.

A Brief is Best Brief

The brief should educate the hearing examiner. Remember, he knows nothing of your case and, even if he does, the record is a bare sheet of paper. He can't rule your way without evidence to support his decision. Keep the brief short – it has more impact that way. Tell the hearing examiner what you will prove, so that he recognizes it even if your witness does a poor job of explaining it. Cite cases in your favor, but don't chain cite. A hearing examiner who sees a litany of cases is apt to think you are weak on the law. He wants the one case that is just like this one. Try to avoid citing other jurisdictions. You are usually better off basing your case on interpretation of your statute than on a case from another jurisdiction, unless that case was decided on the same statutory language. If there is damaging evidence that you believe is irrelevant, say so in the pre-hearing brief so that you can keep it out of the record altogether, rather than to have to argue in a post-hearing brief that it shouldn't be considered. Discuss the remedy. For example, you may have given assistance to an employee organization and should be ordered to cease and desist, but that is different than dominating it, with the remedy being that it cannot appear on the ballot or the issuance of a card bargaining order in favor of the other organization.

Do use an opening and closing statement to remind the hearing examiner of your position and what you hope to prove. If you are defending, it is almost always better to ask to delay your opening statement until you start your case.

At the hearing, don't be litigous and argumentative. The hearing examiner is going to decide the case on the evidence, not on arguments. You can't help yourself, but you could hurt yourself on a close case.

Do be firm and try your own case. By this I mean, don't apologize for what your client did even if it could have been better. I have seen a hearing examiner, who was an ex-NLRB trial judge, say he thought the board's evaluation criteria were poor. He said so strongly in his decision, but he also ruled in the board's favor because there was no proof of discrimination for protected activities. Likewise, present facts to support your contention and don't worry about the other side's case.

I once won an NLRB case where we were charged with taking unilateral action on a negotiable item. Not once did we ever use the word "unilateral," but rather we designed the whole case to prove that the matter was negotiated at the table and dropped as a trade-off. If we had tried to prove circumstances justifying a unilateral change, and we could have taken that tack, we would probably have lost.

Do expect your witnesses to become confused. If that happens, simply tell the hearing examiner that the witness is not saying what he told you previously and the witness will usually understand what he is doing.

Do be prepared to use alternate methods of proof in case your witness is confused, or you are not permitted to introduce evidence as you planned. Here the check list of proofs, with witnesses and documents next to each proof, is an invaluable aid.

Don't put your case in a cross-examination. This is one of the most common mistakes made by advocates. If you question an adverse witness on all the points he made he will merely reiterate and strengthen what he has already said. I have seen council prevent irrelevant evidence on direct examination by properly objecting to it and then open the door for it on cross-examination by asking a question about it. Remember, you can object to a witness moving outside the relevant issues on direct, but you can't do it if you asked the questions. If a witness is lying you are better off proving it with your witnesses than to expect that he will admit it. Chances are he'll take himself off the hook by explaining his inconsistent testimony. If he is inconsistent, say so in your closing argument when he no longer can explain the inconsistency away.

Don't ask a question on cross-examination unless you know and can prove the answer by other evidence. Curiosity is hard to control but before you satisfy your curiosity be sure you want to live with the answer you may get. Don't argue with a witness. Let poor testimony fall of its own weight and tear it apart in your closing statement or post-hearing brief. Anybody can make a witness uncomfortable but doing so usually only brings sympathy to him. If you get a smart alec witness on cross-examination, swallow your ego and let him destroy himself. I assure you, he will.

Don't hide evidence or witnesses. At least, don't give the appearance of doing so. This doesn't mean you have to introduce adverse documents. You simply come prepared to acknowledge their existence and explain why they are not relevant. For example, if you hide a good evaluation of a teacher who was discharged for other reasons you simply lend weight to an evaluation that is not relevant as far as you are concerned. You would be better off to admit that the teacher's classroom performance, as measured by evaluations, was good but that you discharged him for another reason – poor parent-teacher relations. Don't underestimate the other side. Assume they know every fact and legal argument you know. The odds are that they do.

Don't rely entirely on testimony. Use exhibits where they apply. For example, in a discharge case, consider introducing an exhibit showing the evaluation scores of all teachers discharged over the past five years, to demonstrate that the complainant ranked lower than most, or introduce an exhibit showing names of union leaders who were granted tenure, given special privileges, etc. to demonstrate that activists are promoted and treated fairly by the board.

Do rely on noninvolved people as witnesses. Board members and superintendents like to testify to explain the actions they took. The most credible witness, however, is a principal or department chairman who is not involved in bargaining or personnel but has recommended nonrenewal because of a deficiency he believes he sees in a teacher. On unit determinations, the principal's testimony is far more valuable in telling what actually occurs than the superintendent's understanding of what is supposed to occur. I once refused reinstatement of a teacher in a case where I ordered it for two other teachers, primarily because a guidance counselor, testifying under subpoena, reluctantly admitted that the discharged teacher had poor classroom discipline and that he should not be granted tenure.

Do submit proposed findings of fact and conclusions of law. It is a good way to review the facts for the hearing examiner and insure that his findings, if favorable to you, will be well grounded so that they will not be reversed on board or judicial review.

I haven't discussed factfinding here because that is an altogether different animal. Generally speaking you should consider factfinding and issue arbitrations as extensions of the collective bargaining process. This means that the neutral will most likely be attempting to reach a result that he believes the parties themselves would and should reach if they were bargaining in good faith. This is particularly true in advisory factfinding. Binding arbitration, on the other hand, probably is approached by neutrals as a situation in which equity should be done. This must be contrasted with the narrower approach to unfair labor practices and unit determinations where narrow legal issues must be ruled upon.

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The Influence of "Goldfish Bowl" Bargaining in Education

By Dr. Donald R. Magruder

Assume that you are entering collective bargaining with your teachers' union for the first time under a state law recently adopted by your legislature. You are representing school management. Although the law permits you to meet in executive session with your school board to discuss union proposals, counterproposals, or the various limits to which you may go, the actual table negotiations must be open to members of the public and the news media. Awareness of this provision of the law has influenced you to hold the first negotiations session in a high school auditorium, with the table set on the stage.

As you gather your team about you and walk onto the stage, you are flabbergasted! Approximately one-half of the auditorium is filled with teacher union members. News and television camera lights have been placed around the table on the stage. Newspaper and television reporters clamor at you for copies of the counter-demands that you intend to present in return. Members of the audience also request copies of these materials, reminding you all the while of the public documents law and "their right" to obtain a copy.

As you begin the process of collective bargaining, the teacher union representative makes an opening statement. The audience

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Dr. Donald R. Magruder is executive director of the Florida School Boards Association. This article was presented at the Annual Convention of the AEN in New Orleans, April 2, 1976.

cheers! You attempt to make your opening statement. Your remarks are drowned in "catcalls" from a loud "booing" section, expertly led by an individual holding up cue cards.

Think that this scene is far-fetched? Not at all! It is being repeated more and more around the country as collective bargaining gains momentum in the public sector. Doors to the inner sanctum of public officialdom are coming off at an ever increasing rate, ostensibly as a reaction to the peoples' "right to know" and to witness the decision-making processes that will affect them. The culmination of this effort has taken place in the state of Florida, where the people had already gained the strongest "sunshine law" in the nation. It seemed natural, then, for the legislature of Florida to require that all collective bargaining sessions in the public sector take place in the "sunshine," and to permit the operation of the "public documents" law, which requires documents placed by representatives of school boards on the bargaining table to be made public.

Now that the public employees collective bargaining law has been in effect in Florida for over a year, it is possible to examine the experiences that have taken place, the attitudes of the parties bargaining under the restrictions of this innovation, and, at least superficially, to examine the effect that bargaining in the sunshine has had upon collective bargaining contracts in education.

The People's "Right to Know". The movement to involve more active citizen participation in the nation's public schools is an organized movement, spearheaded by the National Committee for Citizens in Education – A "Common Cause" for education. Pierce, writing in "Public Testimony on Public Schools," a publication of the National Committee for Citizens in Education (NCCE), reported that "Eventually, the process of negotiations should be expanded to include parents and students, as well as teachers and managers."[1] He stated further that "for collective bargaining to serve the public interest, the public must have some control over the outcome of the bargaining process." Pierce added that citizens cannot influence the results of the bargaining process in the market, so the public should exhibit their control by directly participating in the collective bargaining that is taking place. He argued that, in contrast with the private sector, the public must be content with the decisions of management and labor – they do not have the choice of buying elsewhere. The question is asked: "How can negotiators be accountable to the public when the public is excluded from participation, and no records of the negotiations are available?"[2]

In a letter to the media, then governor of New York, Nelson Rockefeller states: "The public has a right to know the full details of agreements reached with public employee groups. More often than not, these agreements involve large sums of public funds. At the same time every effort should be made to avoid interference with the collective negotiating process."[3]

These comments are but two examples of many that summarize the school of thought advocating the public's "right to know" with respect to public sector collective bargaining.

The Effects of "Goldfish Bowl" Bargaining in Florida. As was stated earlier, the Public Employees Collective Bargaining Act, adopted by the Florida legislature in 1974, required that all public sector collective bargaining in the state take place in open sessions. The only crack in the sunshine law permits the chief executive, the superintendent and his negotiator to meet in executive session to discuss the collective bargaining parameters, strategy and other matters with the school board. The actual collective bargaining table sessions, however, must be conducted in public.

The Florida School Boards Association has recently conducted a study of "goldfish bowl" bargaining and its effect on collective bargaining in education – particularly from the viewpoint of management. The study was based upon questionnaires sent to school board members, superintendents, chief negotiators for management, school board attorneys and others. Representatives of the teacher unions were contacted, and the resulting collective bargaining contracts were reviewed.

The Board Says

School Board Members. Florida has 349 school board members. Nearly one-third of them, or 101, responded to the question: "As a school board member do you prefer that collective bargaining involving the public sector be performed in open sessions?" Sixty-eight responded in the affirmative – 33 in the negative. With respect to the question: Have you experienced difficulties with collective bargaining as a result of the requirement for "sunshine bargaining", 29 board members, answered in the affirmative, and 70 answered in the negative. Those responding in the affirmative offered the following reasons for their views:

"Since we are concerned, at the table, with the public's schools, children, and taxes, it becomes imperative that the public know the demands of the union on these resources."

"Public bargaining is not comparable to private sector bargaining. Any money spent represents taxpayer's funds, and they are entitled to a blow by blow description of the process. The threat of publicity tempers demands."

"I prefer to keep the negotiations process open because it's easier to reveal the ridiculous position of the union."

"I feel bargaining in the sunshine is beneficial as it gives the public the opportunity to attend meetings and get the true picture of both sides."

"I prefer the sunshine in this area because the PTA and others are aware of requests and facts. Prior to this, the union said anything in the press to their advantage and most of the time not true. Sunshine deters this behavior."

"I believe that the taxpayers should be involved to a certain degree in the collective bargaining process."

"Sunshine is on the side of administration, not labor."

"From comments and phone calls that I have received from the general public, they have favored the board's position in collective bargaining. To keep it in the open will keep the public better informed of what we are already providing the teachers."

Board members' views with respect to the press:

"With open bargaining, I have found that press coverage can be a management advantage."

"Small districts benefit by "sunshine bargaining." The impact of community opinion is very effective."

"If bargaining is closed, one side can tell the press whatever they want and probably get it published."

"It is my feeling that the press deliberately attempts to create controversy which is upsetting to the teams."

Comments by board members who preferred bargaining in executive sessions:

"I feel that open meetings restrict dialogue because there is no way to 'take back' any statement made and then published by the media regarding a position."

"True negotiations do not normally take place. The process takes twice as long. Employees use sunshine bargaining as a forum to get all petty items in print."

"We need privacy on both sides. Adverse news releases, statements without facts, and no real feel for Florida's financial setup render public aid useless."

"It (sunshine bargaining) inhibited the possibility of compromise. Both sides were less willing to compromise in front of the press."

"Many teachers attended meetings – booing and hissing – creating disturbances – and very few, if any, other of the public attended."

With respect to the views of the elected school officials, the school board members, by greater than a two to one majority, "goldfish bowl" bargaining is approved and recommended.

The Superintendents Comment

With respect to the state organization of local education in Florida, the county system is utilized. There are 67 school districts and 67 counties in that state. Fifty of the superintendents are elected by the voters of the district, and 17 are appointed by the local school board.

The collective bargaining law in Florida places the responsibility for conducting negotiations squarely upon the superintendent or his designee. Further, upon reaching agreement, the superintendent is required to sign the agreement and present it to the school board for their approval.

Of the 67 superintendents, 42 responded in the present study. In answer to the question: As a superintendent do you prefer that collective bargaining involving the public sector be performed in open sessions, 27 answered "yes" and 15 answered "no".

Thirty of the superintendents indicated that they had experienced no difficulty with open bargaining, while 12 stated that they had experienced some difficulties with the situation.

Comments by the superintendents: "When one considers the right to the public to come and hear how the bargaining is conducted, this case probably outweighs the fact that bargaining is probably a bit more effective in secret.

"One advantage is that the bargaining unit cannot use the press to gain public support for their position because the press now hears both sides of the issue."

"If the public has a right to information on personnel appointments, budgets, curriculum decisions, proposed school construction sites in regard to public education, surely they have a right to decisions relating to collective bargaining."

"Open bargaining helps the third, public interest, to have a bearing on negotiations."

And on the other hand . . . .

"Only teachers have attended our bargaining sessions, and they have not always been courteous."

"Too much playing to the press and/or audience."

"Generates too much news copy prior to agreement; encourages maintenance of public image; keeps union supporters worked up for the duration of the bargaining and prolongs the process."

"I found the union to be hostile when a group was watching; the larger the group, the more hostility."

"We find it almost impossible to reach final agreement with a roomful of on-lookers and media."

"The glare of publicity tends to harden lines which can be compromised only with difficulty."

In our original hypothesis, it was believed that the superintendents would prefer to have bargaining in the shade. The results proved that the hypothesis was really not an accurate one – that overall, as a group, they preferred bargaining in the open.

The Chief Negotiators Say

In the conduct of the study, the chief negotiators of the school districts were sent a fairly comprehensive questionnaire regarding collective bargaining in the sunshine. Since these persons had been designated as the "front line forces" in implementing the collective bargaining legislation, it was our intention to gain as much from their experience as possible. The communication with the chief negotiators requested information on the following items:

"With respect to management's position in negotiations, 1.) What do you think are the

advantages of bargaining in the sunshine?" 2.) What were the disadvantages? 3.) What were the advantages for the employee organization? Disadvantages? 4.) Do you believe that bargaining in the sunshine should be continued in the law? 5.) State the average number of persons in observation at your negotiating sessions? And, finally, 6.) Were representatives of the press present?

Forty-one responses were received. This number represented 88% of the school districts in collective bargaining last spring. The results were as follows: Twenty-three negotiators believed that the law should be changed to permit bargaining in the shade. Fourteen believed that bargaining should be conducted in the open, and four of the negotiators didn't want to comment until they talked to the superintendent or school board.

Most representative of the negotiators who believed that bargaining should be conducted in private was Fred B. Lifton, a Chicago attorney engaged by one of the districts. Lifton stated that "My theories, adverse to open negotiations, were borne out by actual experience. The prime evil was not the posturing to the press, although there was some of that, nor unreasonable emotional outbursts or difficulties with supplying materials to the press. It was simply the fact that having to deal in the open makes compromise and change of position by the parties extremely difficult. I think that this is significantly more of a problem for the union at the table than for management, but in this instance, the union's problem becomes management's problem."

The negotiators in Florida, being familiar with the sunshine law in other areas for several years, concurred with Lifton's views but not to the degree anticipated by our hypothesis. A majority of, or 57% of, them believed that bargaining should take place in the "shade." Thirty-five percent preferred that bargaining remain in the open, and eight percent expressed no preference.

In speaking of the disadvantages to management of open bargaining, the negotiators reported bargaining in the sunshine:

1. Tends to polarize positions.
2. Participants "play" to the press.
3. School district weaknesses are pointed out to the press. Management is placed in a public defensive position.
4. Unions use the sessions to garner the support of their membership.
5. Union audiences apply pressure to the management team.
6. It is difficult to openly express and discuss options and alternatives.
7. Where there are rival teacher unions the minority union uses the sessions in a critical way to disparage the "in" union and management.
8. The process is more time consuming.
9. Bargaining in the open emphasizes adversary relations.

The negotiators who favored "goldfish bowl" bargaining indicated the following advantages to management:

1. Public opinion was generally opposed to union demands.
2. Ridiculous teacher union demands were fully revealed to the public.
3. The union was less inclined to make misleading or untrue statements.
4. The teacher union was placed in a defensive position.
5. The public was keenly aware of the negotiations process through attendance or through the news media.
6. Less abusive language was used.

The Public and the News Media

An issue of much interest was – how active was the public in participating in the negotiation

sessions? And, how active were the news media in reporting the process of negotiations?

Although the national committee for citizens in education purports that school governance is in trouble; that public hearings are needed; that lay control has eroded; and that the people have demanded a change; it was very apparent that the citizens of Florida were not interested in getting involved with open bargaining sessions.

With respect to the participation of the public, apparently, very few witnessed the negotiations. The public's active participation, through attendance at the sessions, was typified by the comment: "I was somewhat distressed to see almost total apathy on the part of the public in regard to collective bargaining."

Another: "Out of the 21 sessions at the table, only five sessions were held when observors were in attendance." Most of the negotiators reported only one to three persons present at a few of their sessions, and these persons were teacher union members.

One can conclude, from the reports of the negotiators, that members of the public, or parents, or "taxpayers" had better things to do than to attend collective bargaining sessions. Perhaps they relied upon the media to attend and report on the progress of the process. Perhaps, since it was the first year of formal collective bargaining, the public was not motivated, sufficiently, to attend the meetings. One thing was certain, however; the citizen was in no hurry to join the participants at the collective bargaining table.

With the news media, however, it was a different story.

A majority, or 15, of the negotiators reported that the news media attended the collective bargaining sessions on an "occasional" basis. In questioning the negotiators, it was determined that when the process first started it received much attention from the media. As the sessions continued, however, and the "novelty" wore off, the members of the press became conspicuous by their absence. It soon became apparent, in most situations, that, since the bargainers had settled down to the discussion of demands, counter-demands, wording changes, and hours concentration upon leave policies, transfer policies, or other mundane working conditions, that, for the most part, news was not being created.

There were exceptions, however. Nine of the school districts reported that members of the news media attended *every* collective bargaining meeting that was held. These districts created news! The districts creating this attention were split between the large, metropolitan school districts, with sophisticated news coverage teams, and small school districts who were entering the collective bargaining process with much reluctance.

Here are some of the pertinent comments:

"The press attempted to be fair and impartial. However, because they did not always understand procedures and terms used in bargaining, statements were taken out of context which tended to polarize the parties."

"As the sessions diverted their attention to money items and were drawing to a close, the press was ever present."

"There were occasions when the press did not cover entire sessions."

"Only one reporter consistently covered the sessions from beginning to end. This reporter's coverage of our session was most accurate."

Ten of the districts reported that *none* of their collective bargaining sessions were ever attended by any representative of the news media, and one district reported only one visit by the media. The districts reporting no media coverage were all small rural districts in which the collective bargaining process was not sought by either party, but became a *fait accompli* through state law.

Teacher Unions

There are two major teacher unions or associations in Florida – the Florida Education Association – United (FEA United) and the Florida

Teaching Profession (FTP). The NEA-United is affiliated with the American Federation of Teachers (AFL-CIO), and the FTP is affiliated with the National Education Association. During the course of this study, both unions were contacted with respect to "goldfish bowl" bargaining. The official position of both unions was the same – they were not prepared to make any recommendations to the state legislature after one year's experience. It had been anticipated earlier that the unions would request a change in the law so that bargaining could be conducted in private. Albert Shanker, president of the American Federation of Teachers, at an FEA-United convention held as recently as March 26, 1976, in Orlando, stated quite plainly that he did not believe meaningful collective bargaining could take place in public. The reason for his position became quite obvious when the comments of negotiators for management were reviewed. Here are some sample statements:

"The employees demands were so self-centered that the general public was really turned-off."

"The union's absurd demands were opened to the public – their real purposes were exposed."

"The teachers had to keep their demands reasonable."

"The public became aware of the teachers' poor comprehension of school financing, lack of concern for student programs, etc."

"The union was consistently performing and putting on an act for the constituents."

"Organizations were at a disadvantage to openly discuss exactly what it would take to achieve a satisfactory settlement for the employee unit."

"It (bargaining in the sunshine) kept the association from moving quickly on some issues that they felt were unimportant. They had to do some more talking."

Comments obtained privately from leaders of the two teacher unions indicated that they would much prefer to bargain in executive session. With the historical strength of the news media in obtaining and supporting government in the sunshine, however, and with the legislature's obvious reluctance to depart from this principle, for whatever reasons, both unions adopted a "hands-off" policy.

Summary and Recommendations

The "Collective Bargaining in a Goldfish Bowl" study began with certain assumptions:

Assumption No. 1. School board members favor retention of the law requiring collective bargaining, since all other board activities must be conducted in the "sunshine."

This assumption was correct since approximately 68% of the school board members responded positively to this query. Approximately 70% of the school board members indicated that they encountered no difficulties in bargaining in the sunshine.

Assumption No. 2. School superintendents would favor collective bargaining in private sessions as a normal reaction but, in Florida, would have an even higher percentage for private bargaining because they were named in the law as the person responsible for bargaining. This assumption was not supported by evidence. Twenty-seven of 42 superintendents indicated that they preferred "goldfish bowl" bargaining to executive session bargaining. Thirty of the 42 superintendents indicated that they had encountered no difficulties in open bargaining.

Assumption No. 3. Chief negotiators preferred collective bargaining to take place out of the sunshine. This assumption was proven correct since 23 negotiators out of 41 indicated that they preferred the law to be changed to permit bargaining in the shade. It was significant, however, that the majority of the negotiators indicating preference for private sessions was a slight majority.

Assumption No. 4. The public would not participate to any significant degree, through attendance, at the bargaining sessions. This assumption was predicated on past evidence of apathy

among voters, attendance at school board meetings, citizen involvement on citizen's advisory committees and other instances, this assumption was correct.

Assumption No. 5. The news media would take great interest in attending and reporting on the collective bargaining sessions. Most of the negotiators reporting on this question, fifteen of them, indicated that the news media attended the collective bargaining meetings on an "occasional" basis. Nine negotiators reported media representatives present at every session. Ten negotiators reported that no news media representatives were ever present at their sessions.

Assumption No. 6. Teacher unions preferred collective bargaining to take place out of the sunshine. This assumption has not materialized as fact. Although the teacher unions may privately prefer to bargain privately, they are not indicating such a desire publicly. Both of the major teacher unions have taken an official "hands-off" position on this question.

The conclusions that must be arrived at are: past practices of public officials operating in the public for many years, as required by law, have permitted an easy transition to workable collective bargaining in a "goldfish bowl". The requirement that financial books and records are all to be made available to the public, under a strict "public documents law," has added to the ease of transition to sunshine bargaining. In Florida the public's business has been open to the public for a long time.

Recommendations: As a result of the study of collective bargaining in a "goldfish bowl", suggestions and comments received from school board members, superintendents, chief negotiators, union leaders and others, a modification of the sunshine law in bargaining seems in order to the following extent:

Negotiators in the public sector should be required to continue bargaining in the sunshine; however, if an impasse is reached or if mediators or arbitrators are called in, the law should be amended to permit the parties to meet privately for a period of time, such as ten or 20 days, to attempt to break the log jam that is holding up progress. Once the differences are ironed out, however, the parties should be required to meet publicly; once again above all, the governing body's consideration of the final contract should take place at a public hearing at which representatives of the public should have the opportunity to make their thoughts, with respect to the contract, known. For it is the public, finally, that will pay, and it is the contract that will materially affect their children's education.

There is no question that bargaining in a "goldfish bowl" inhibits compromise, lengthens the bargaining process time-wise, is more expensive, creates controversy, and fosters additional unnecessary adversary relations. The results of this study indicate, however, that even with all of these disadvantages, school board members, superintendents, the public, news media, and, at least on the surface, teacher unions, believe that "goldfish bowl" collective bargaining should be retained.

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What Can Mediators Rationally Expect of Management Negotiators

By W. D. Heisel

This subject poses a serious risk – a risk of reciting all of the human virtues. Yes, a mediator expects these – honesty, openness, frankness, truth, fair dealing. But you know this; further, I won't insult you by suggesting that any of you have less than a brightly-shined halo.

Rather than waste your time on the obvious, I would prefer to bring out a few points and discuss them briefly from the mediator's view. This approach will also leave time for dialogue, which I am sure will be more valuable than one-way communication.

Does Mediation Represent Failure? One question to be addressed at the start is the negotiator's attitude toward mediation. Does the call for mediation represent failure of the negotiators?

The presumption of the collective bargaining process is that two parties can sit down at the table and hammer out their differences. Implicit in this assumption is the concept of rational decision-making. Each negotiator prepares himself well in advance and marshals facts and figures which he lays upon the other party. Presumably these data are supposed to influence the other party into agreement or at least into making concessions which can be accepted by the party offering the facts.

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or at least into making concessions which can be accepted by the party offering the facts.

If rationality prevailed at the table, I would have to say that the call for mediation represented failure – a failure to communicate these data to the opposite party with adequate analysis and application to the given circumstances. If decision-making were purely rational, both parties would inevitably reach the same conclusion on the same set of facts.

But who says bargaining is a fully rational process? Management must take into account that the union is often guided by events that can be described as anything but rational. Management's negotiator must, for example, be aware of internal union political factors which influence the union course of action. Those chosen as the union negotiating team may well be a reflection of these political considerations and may in turn influence management strategy. In one situation in which I was involved, for example, the teachers' chief spokesman was a senior employee with enough union clout to be able to put his own personal interests above those of the majority. You are all aware of similar situations. Rationality then goes out the window; all the data in the world won't get him to agree to anything that is not in his self-interest.

Who's Being Irrational

I do not want to imply that the union has a monopoly on irrationality. Recently, for example, one school superintendent acknowledged to the mediator that he had been beaten by the union last year, and by golly, he was going to "win" this year. Pity his poor negotiator!

Returning, then, to the major point – when the bargaining becomes confused with emotional or other irrational considerations, communications will likely suffer. When this occurs, the call to the mediator is not an acknowledgement of failure. It is simply a recognition that a contaminating influence – irrationality – has entered what is supposed to be a rational process.

Communication is the role that mediators should best be able to perform. This is the primary reason for their existence. The mediator feels he is successful if he keeps the parties talking to each other.

I elaborate on this issue of failure simply to emphasize the need to call the mediator early enough in the bargaining process, before either or both parties have painted themselves into their respective corners. Mediation is often a face-saving device, but the mediator is no miracle worker. Hopefully, he can be called to the scene before either party has dug in too deeply.

Finally, support for what I have outlined can be found in the National Labor Relations Act governing private sector labor relations. One section requires notification to the Federal Mediation and Conciliation Service of any bargaining situation not resolved by 30 days before contract expiration. This permits the Service to begin monitoring the situation and to offer its services if need be. They don't want to wait past the point of no return.

There Are Essential Requirements

Good faith bargaining: The principal posture that the mediator expects of management negotiators (and of union negotiators, for that matter) is good faith at the table. Each of you knows the legal definition of good faith bargaining, and each of you has his own interpretation of what "good faith" means. Omitting the usual recitation of the human virtues, as I promised earlier, I would like to emphasize a few points which I regard as fundamental to good faith, in relation to mediation.

1. *Openness:* When a mediator is called in, he will want to know if the parties have been frank with each other. Have they presented their arguments fully? I don't mean that they necessarily have made their final concession; in some instances it is better to let the mediator suggest it, particularly if there is a chance it will be rejected. I refer particularly to your factual presentation, to your reasons for your position. Each side should at least understand each other.

2. *Authority to commit:* Good faith bargaining requires that the negotiator be authorized to commit his principal, at least up to a specified position. When the negotiator can't come to agreement, there is no bargaining.

3. *Acceptance of bargaining as a means of decision-making.* Perhaps most important, underlying good faith bargaining must be a commitment to the bargaining process itself. I am not suggesting that management must be pro-union. I am suggesting that anti-union feelings will be transmitted, either verbally or nonverbally, and the level of hostility increased accordingly. Negotiators should be willing to accept the process as a way of decision-making. You may not consider it the best way, but it is the way chosen. Don't knock it. You might otherwise be unemployed.

The anti-union, or anti-bargaining, attitude is often the root cause of refusals to bargain or to bargain in good faith. In states with laws mandating bargaining, charges may be brought before the appropriate regulating commission. In states without statutory guidelines, the result can range from poor staff morale to strike. One time, I was called in as a neutral in a dispute between a teacher association and a school board which responded to the submissions of the teacher demands with the flat statement "we don't have any money so there is no use talking." This in spite of an existing contract prescribing a re-opening date and impasse resolution procedures. In addition, the statement proved false; they had adequate funds for a reasonable increase. But the board did not accept the bargaining concept and did not understand its values as well as they understood its implications. Needless to say, this board did not have professional representation.

Access to Principals: I have previously mentioned the need for the negotiator to have sufficient authority. But I recognize that this authority is ordinarily limited by top management or the board of education itself. In the ideal world, the negotiator should be in close communication with his top management and should be able to get management to periodically adjust its position in accordance with the realities of the situation.

However, it is no state secret that the ideal does not always match reality. Generally, I find negotiators more understanding than their principals, primarily because they understand the process. While the mediator should not have to contact top management, I have had occasions when this was the only way to obtain movement. Management's negotiator was limited in his powers of persuasion by his subordinate relationship to the superintendent. The negotiator found it useful to have the mediator, as an outsider, intercede to get authority to move.

I am not sure all mediators would consider it within their role to deal with top managers who do not appear at the bargaining table. Personally, I have no objection if I feel the negotiator has exhausted his power to move the administrator. In a sense, I am doing some of the negotiator's work. My role is to seek a settlement and if talking with a school superintendent helps to produce it, I am all for it.

On the other hand, I would hate to see this statement interpreted as an open invitation to abuse. When a mediator meets with top administration to get the negotiator more authority, there is an implicit assumption he is advocating a management concession. Admittedly this is not a typical mediation posture. It should be reserved only for those cases -- hopefully rare -- when he senses that management's position is more emotional than rational.

Perhaps an example would illustrate the type of case I have in mind. One set of negotiations went into mediation with one of the principal issues being the length of the school day. The administration was stuck on a position on hours which had the effect of keeping the teachers in the school buildings after all students had left. The negotiator wanted the ability to modify this stance in order to close on other issues, but the superintendent was adamant. The mediator's intercession in this type of case helped. On the other hand, I would hate to ask a school board to increase its economic package, unless a *most* unusual factor was involved.

Consideration of Mediator's Proposals: One thing that all mediators expect is serious consideration of any proposals they put forward, whether privately or to both parties simultaneously. I do not mean you must agree but simply that you give serious consideration. The typical circumstances of mediation justify this suggestion. Why is the mediator present, in the first place? He was called in because one or both parties felt that negotiations had reached an impasse or were about to. In short, somebody thinks negotiations are in trouble. (I will acknowledge that unions are more likely than managements to arrive at this conclusion. Nevertheless, the call for mediation indicates the union perception of trouble.)

A Mediator's Worth

When a mediator comes into the picture, then, he is supposed to bring three primary attributes: (1) objectivity, (2) communications skills, and (3) ideas for consideration. When he assesses the situation and puts forth a proposal, it is either worthy of consideration, if not adoption, or you should get a new mediator.

Here again we get back to rationality. Are the parties reaching to real conditions and the facts of life or to some bias against anything which lessens their chance to "win while the union loses? No mediator worth his salt is going to suggest a position he does not believe in. Yet some managements view anything but a complete advocacy of their position as a sellout to the union.

In some cases this arises because some managers, usually not the professional negotiators, do not know how the mediator works. When the mediator meets with management, he may sound as if he is advocating the union position. He wants to be sure you understand and consider it. But keep in mind that when he meets with the union committee, he may sound to them as if he is advocating the management position. He does the same thing to them as he does to you. My plea, then, is simply for consideration of whatever his compromise proposal is. Reject it if necessary, but consider it.

Trust: This leads to another expectation of the mediator, trust in his neutrality. Without trust, he is useless. A good mediator deserves this trust and will not violate it. Without it, he cannot expect the frank statement of final positions on key issues which is necessary to a settlement. The mediator must know the bottom line for both parties. He knows it is useless to suggest a solution either party cannot buy. To do so is simply unrealistic. He needs to know an acceptable position you may be unwilling to put on the table yourself, for fear of rejection. If you yourself put a truly final position before the union and it is rejected, you have no place to go. If you have the mediator feel out the union and put it out for you, you will know whether or not it is safe to proceed.

He can thus "steal" your proposal as his, not to become a hero but simply to accomplish the objective you had in bringing him in – getting a settlement. But you have to level with him to do it.

What Not To Expect of a Mediator: Thus far I have discussed what a mediator expects of a negotiator, on either side. I have emphasized the need for good faith bargaining, for open communication, for trust in the mediator – all things you know but perhaps now see from a different perspective.

In closing, I would like to reverse my posture thus far and talk about what not to expect of the mediator. Don't expect him to pull off miracles.

If he can't persuade you to go beyond your bottom line, don't expect him to be able to get a union to go beyond its bottom line. If you can't sell an adamant position, chances are he can't, either. If both parties are emotional rather than rational, his efforts to bring rationality into the process are likely to be doomed to failure.

The role of the mediator is to try to produce agreement. To some, this sounds like compromise and often is. It is rare to find negotiations where all of the "right" is on one side. If the miracle you expect is for the mediator to pull the union to a management viewpoint, you are likely to be disappointed.

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Effective Evidence and Presentation for Influencing a Factfinder or Arbitrator

By Arnold M. Zack

I must confess that from time to time in my career, I have found it difficult to restrain myself when one of the parties has failed to challenge unsupported assertions of the other side or blown its case by inadequate prior investigation and preparation. Although I must admit that I have never been an *advocate* for labor management and although I feel strongly that it is *not* the responsibility of the neutral to bolster the presentation of the under represented party, I do feel the temptation to ask that final question that will destroy a witness' credibility or ask how the parties had dealt with the problem in dispute prior to the filing of the instant grievance.

I should point out that my comments are not directed to helping school boards to "put it to" the association or the union in negotiations, because I do not view the impasse process as being exemplified by the Thurber cartoon captioned "Touche" where the swordsman's epee has cleanly cut through his opponents neck. Rather, I view the process as one of mutual problem solving. In factfinding, then, the role of the neutral is much more than mere finding of fact; it is, rather, achievement of mutual accommodation to a given set of demands and positions of the parties, with the long term objective of perpetuating the marital relationship between them.

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In grievance arbitration, the role is to interpret or apply the parties' agreement in the light of a current fact situation which was uncontemplated at the time of negotiations. I, for one, feel that although pushing the opposition to surrender on bended knees may result in a sense of triumph, for the winning party that exhilaration is too often transitory and, indeed, may well come back to haunt you (in spades if I may scramble some metaphors) when the economic or political pendulum swings to provide the other side with transitory power. Indeed even on the short run, the sense of injustice, which is the residue of having "socked it to them", not only raises the ante for settlement of the subsequent negotiations, it also makes for a disruptive and antagonistic relationship for the remainder of the life of the present agreement.

My objective as factfinder or grievance arbitrator is to use the process to seek what evidence is required for resolving a particular dispute. I trust that, too, is the intent of the parties in presenting their evidence to me. The clearer the exposition of fact, the more likely it will be persuasive, not only to the neutral but to the other side as well.

This leads me, then, to a consideration of what the parties, you or your opposition, can do to most effectively develop and present evidence to favorably influence the factfinder or arbitrator.

Let me take the liberty of dealing with the two procedures separately, because the standards and objectives of the two are different.

When Factfinding

If, as I just suggested, the equitable resolution of a contract impasse is stimulated by enlightenment rather than obstructional or beclouding tactics, then perhaps the most important means of convincing the neutral, as well as perhaps the other party, is to achieve agreement on the facts.

"People can not disagree on facts; they can only be ignorant of them!" I have seen many impasses focusing on misunderstandings or refusals of the parties to reveal information which could quite easily be confirmed by independent investigation. In one hearing the parties argued for hours over their differing calculations of the cost of the association's proposal.

On the other hand, I have been in hearings where there was agreement not only on the cost of all elements of the positions of both parties but also on several possible positions between. In another case, the parties actually spent three hours arguing over the number of teachers in the system, and when the board belatedly explained that they had included teachers on sabbatical, the association recognized that they were in accord on the cost estimates, that their previous suspicions were unfounded, and that the board had not been pulling a fast one. Out of this recognition came a sudden sweep of trust, and a settlement followed within minutes.

Trust Each Other

There is no reason, that I can determine, other than orneriness or ignorance that keeps the parties from jointly developing factual data. Truth will out. Nothing is achieved by the employer carefully selecting ten cities for a wage comparison while the association, in equal secrecy, selects ten others, particularly when each side challenges the accuracy of the data itself.

How much more useful it would be to have the parties agree, prior to the hearing, on the towns they will be using and getting the true figures for each. Even better; perhaps they can agree on one or more appropriate universes for examination, e.g., towns of like size, contiguous towns, or towns within an agreed upon radius. Such mutual activity not only provides an additional opportunity for meeting together, but it may also provide necessary enlightenment as to the relative position of the town in question and will at least provide the neutral with one or more standards of comparison for making his judgment.

Similarly in dealing with an argument based on ability to pay, mutual prehearing examination of the budget or of expenditures during the previous years saves time and conflict at the hearing and reduces the suspicion of the other side that readily available funds are cleverly hidden. It may, perhaps sufficiently, explain the problems facing the

the employer, so as to bring about acceptance of arguments and consequent settlement.

Such mutuality of data presentation does not mean that agreement on settlement or even on the data itself is assured, it is merely urged for use as an under-utilized device for eliminating unnecessary hassling over ascertainable facts which may, indeed, inspire momentum toward settlement.

Our frustration as factfinders, in trying to sort out such conflicts over data, is matched by our disappointment over other tactics of the parties. Let me enumerate some:

First: Negotiability. Why must there be endless debates over the question of whether or not a subject is negotiable? I certainly respect the right, and in many cases the validity, of the invocation of nonnegotiability for certain items. But, would not it be less provocative to set forth the nonnegotiability position and then, without prejudice to that position, listen off the record to the proposal being made on the merits by the other side?

Such discussion has a clear cathartic effect; it may lead to an understanding that may be internalized in some form other than inclusion in the agreement; in the final analysis, it can, in any event, also be denied on its merits. The adult opposition is entitled to better treatment than we received as children, when our own parents, too, adhered to the position that something was not discussable. Is not the opposition entitled also to feel some of the resentment and frustration that we felt as children when the argument you now make was made to you?

Second: Tripartite panels: Why do the parties augment the costs and reduce the impact of the factfinding process by requiring tripartite factfinding panels (unless so ordered by statute)? Presumably a factfinder is chosen for his judgment. Yet, if that judgment differs at all from that of one of the parties' designees on that panel, the parties to the dispute are deprived of his undiluted judgment. To achieve a supporting vote, the neutral is often forced to undercut his own judgment for the sake of the second vote necessary to achieve a majority.

The only benefits, which I can ascertain are ascribable to the tripartite procedure, are the opportunity for a second chance at argument, which is usually repetitive and no more convincing than the argument presented initially at the hearing and the opportunity for working out a settlement. Indeed even repetition may be beyond the capability of some of the wing men I have had to work with. The other alleged benefit to the parties, working on settlement can be accomplished, perhaps even more effectively, by the neutral being able to meet directly with those possessing the authority to settle.

Third: Unjoined Arguments. Are neutrals expected to conclude, because arguments raised by the other side are not responded to, that they have no merit or that they will go away? Too often, the parties come to the factfinding hearing armed with a strong affirmative case and totally ignore the case presented by the other side. In factfinding, this may show itself in the association's reliance on comparability while the board argues ability to pay.

Failure of either party to meaningfully challenge the other side's position by cross examination and rebuttal or even attempt to minimize it with an assertion of its irrelevance does not destroy its impact. Indeed, silence may be construed as a tacit acknowledgment of the accuracy of the evidence and arguments presented. While speaking of ability to pay, I would like to note that too often employers seem to paint themselves into an inescapable corner by reliance on the argument of inability to pay, when indeed they mean unwillingness to pay. If they take the inability-to-pay route, their defense, that the funds are lacking, is readily shattered by a showing that the community does have or can readily gain access to the funds necessary to fund the proposal. If they take the unwillingness-to-pay route, then a showing of financial riches does not of itself terminate the dispute and leads instead to a determination based upon equity and, ultimately, acceptability.

Fourth: Settlement at Hearings. Why must the parties run the risk of an adverse determination if they can settle a dispute on their own mutual agreement. It is true that mediation is structured to

come only as the preceding step to factfinding, but it is also true that the prospect of factfinding often deters effective mediation and that mediators are not always totally effective. This should not doom the parties to blind adherence to the prescribed factfinding step. Indeed, factfinding itself is not final and binding, and the factfinders themselves are not adverse to encouraging, if not tolerant to, the efforts of the parties to withdraw a case from their venue in order to settle it on their own. Indeed, the parties may select a factfinder who may have the willingness and the skill to help them in their negotiating efforts by serving in a mediatory capacity.

Too often, I find the parties feel unnecessarily constrained in their commitment to resort to factfinding: they are reticent and reluctant to suggest renewal of direct talks for fear it will be viewed as a sign of weakness. But, such need not be the case, even if the only avenues for reopening negotiations are to state to the other, "Let's see if we can get *you* off the hook," or to suggest at the hearing an earlier willingness to settle; this, the neutral can goad the parties to work it out on their own, with or without his mediatory assistance.

The foregoing few suggestions, as to procedure, won't necessarily guarantee the total endorsement of your substantive position by the neutral, but they may help to reduce the conflict between the parties in the factfinding process.

Points for Effective Arbitration

Although some of the suggestions are equally applicable to grievance arbitration, there are a number of other suggestions in that subject area, which are also worthy of mention, to improve the effectiveness of the parties' presentation. Let's look at some:

First: Handling Arbitrability and the Merits at the Same Hearing. There are occasionally cases in which the employer, and less often the association, contend that a case is not properly before the arbitrator. The issue is one which is not covered by the collective bargaining agreement; the appeal to arbitration was not brought in timely fashion; or the case had, in fact, already been settled.

While the parties are assembled, it makes sense for them to first present their arguments on the arbitrability question and, then reserving their rights thereon, proceed to present their cases on the merits. Everyone is there; the facts on the merits are usually necessary for consideration of the arbitrability issue; and the delay and cost of a second hearing can be avoided by proceeding to the merits at once. The arbitrator will decide the arbitrability issue first; if he holds the case arbitrable, he has what he needs to dispose of the case on its merits. If it is not arbitrable, the merits issue is not reached or decided.

Second: Agreement on the Issue. Although it is true that the arbitrator is bound by the agreed upon issue (and indeed also true that a party may win or lose a case by the way in which an issue is framed), the fact remains that the parties do waste considerable amounts of time in endeavoring to prejudge the case in dispute by so narrowly defining the issue as to preclude the other party from any chance that it might prevail. This may be worth a try, but in the long it hardly induces the kind of goodwill and mutuality that one has a right to expect and enjoy in the collective bargaining relationship.

If you are unsuccessful in your effort to get the other side to agree to a one-sided presentation of the issue, why not recognize that the only agreeable issue is one which is broad enough to permit sufficient breadth to effectively argue both cases? If the other side insists on a warped statement of the issue, it ill serves you or your client to perpetuate the hostility for more costly hours of fruitless debate. Be assured, the neutral you had sufficient faith in, to select in the first place, will also have sufficient judgment to focus on the true issue between the parties. Either specifically give him authority to frame the issue as he sees it or, at the very least, propose the issue as being: "What shall be the disposition of the particular grievance in dispute."

Third: Stipulation on Exhibits and Facts. As noted earlier, agreement on undisputed facts is a valuable time saver and, if done early enough, often a convincer of the other side. The parties should be encouraged to seek agreement on the

exhibits to be introduced, as well as the facts of the case if they are not in dispute. It may be momentarily gratifying to spring new evidence at the hearing, but the arbitrator may exclude it if it was not presented at the earlier steps of the grievance procedure or at the minimum may permit an adjournment of the hearing until the surprised party has an opportunity to prepare a response thereto. But if there is agreement on the facts, there is another benefit to be gained. It should be possible to forego the hearing entirely and present the stipulation of the facts and the briefs containing the arguments of the parties directly to the arbitrator by mail. This approach is faster, cheaper, and free of the pressures of meeting a hearing deadline, since the parties can work out their own submission schedule.

Fourth: Restrain Your Objections. Arbitration is not a court of law; you are not dealing with a jury of "12 jellyfish and true," as one of my law professors once called them, and the arbitrator; *your* selected arbitrator is well able to distinguish hearsay, immaterial or irrelevant evidence, parole evidence, best evidence and the like. While an objection raised to call the neutral's attention to such questionable presentations certainly serves his best interests (while showing your client you are on your toes), grating renewal of excessive objections can only antagonize the opposition and perhaps the neutral as well. Arbitration is not a court of law, and it is to our mutual advantage to prevent it from achieving the rigidity and excessive resort to legalism and delay that have so hampered the achievement of rapid justice in our courts. The arbitrator is experienced in sifting through what is admissible and is readily able to ignore what is not.

Fifth: Adequately Develop Your Evidence and Arguments. Too often, one or both of the parties is caught unprepared by the evidence presented by the other side. There is no substitute for adequate and early preparation. Find the facts, double check them, trace the negotiating history of the provision in dispute, trace the practice of the parties in living with the disputed clause under this and predecessor agreements, select the most knowledgeable witnesses, and avoid repetition and cumulative presentations. Above all, do a dry run of the case with your best people role playing the opposition, to test the quality of your presentation.

Sixth: Be Prepared to Argue Your Case Orally. There is too great a tendency for the parties to rely on written post hearing briefs. These drag out the time necessary to decide the case; they increase the cost of the process; and they contribute to the likelihood that the neutral will postpone his homework until they are rendered. You then are running the risk that his determination will be made at the bottom valley of his memory curve. Although it places a heavier burden upon the spokesmen to be expected to argue the case orally, so doing is the only way the parties have of making sure that the neutral has the full understanding of their position and demand, at a time when he can ask questions about their arguments.

Reliance solely on post hearing briefs runs the risk of those arguments being unjoined – passing like trains in the night. Oral argument at the close of the hearing, on the other hand, assures that each side knows of and has an opportunity to respond to the other's argument. Most importantly, the arbitrator has a chance to ask further questions as to previously glossed over evidence and as to the arguments raised by the parties themselves. Post hearing briefs may have their place, as do transcripts in particularly complicated cases, but they should not be used as a crutch in shirking responsibility to fully present one's case at the hearing or to entice anyone, including the arbitrator, to catch an earlier plane home.

Seventh: Pleading in the Alternatives Is Not an Admission of Guilt. There is a tendency, on the part of both parties, to present only the strongest cases, due to fear that arguing in the alternative is a sign of weakness in the original position. Indeed this strong posturing does not necessarily deter the arbitrator from ordering a lesser result if he deems it appropriate. Yet, too often, the parties forego the opportunity for desirable leverage over the settlement by neglecting to articulate a fall back position.

Thus in the case of a discharge for insubordination, an alternative argument, "even if reinstatement is ordered, assignment should be to a

different supervisor," might prevent the likelihood of the grievant being reinstated to his former position. Similarly, a defense of failure to promote which pleads in the alternative, "that if deemed qualified, the grievant be given the next available post rather than an immediate assignment," might avoid considerable disruption and make a losing situation much more palatable.

The same theory applies to discussion of the remedy. Failure of the employer to reveal that the grievant had substantial interim earnings while out of work or argument that the grievant should not be entitled to vacation pay on reinstatement because of the timing of his termination runs the risk that liability may be greater than need be.

The foregoing catalogue is far from inclusive and, for print at least, I am unwilling to reveal any further hints for improving the effectiveness of your role . . . for to do so might mean you could resolve all your disputes on your own without factfinder or arbitrator . . . and if that happened who would you call back, to the sunny south, to "give you hell"?

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